DOCKET

No. 13-534

Title:	North Carolina State Board of Dental Examiners, Petitioner v. Federal Trade Commission
Docketed:	October 29, 2013
Lower Ct:	United States Court of Appeals for the Fourth Circuit
Case Nos.:	(12-1172)
Decision Date:	May 31, 2013
Rehearing Denied:	July 30, 2013

Questions Presented

--- Date---	------- Proceedings and Orders----------
Oct 25 2013	Petition for a writ of certiorari filed. (Response due November 29, 2013)
Nov 12 2013	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.
Nov 20 2013	Order extending time to file response to petition to and including January 2, 2014.
Nov 27 2013	Brief amici curiae of North Carolina State Bar, et al. filed.
Nov 27 2013	Brief amici curiae of American Dental Association, et al. filed.
Nov 27 2013	Brief amici curiae of West Virginia and 9 Other States filed.
Dec 23 2013	Order further extending time to file response to petition to and including January 21, 2014.
Jan 17 2014	Order further extending time to file response to petition to and including January 22, 2014.
Jan 22 2014	Brief of respondent Federal Trade Commission in opposition filed.
Feb 3 2014	Reply of petitioner North Carolina State Board of Dental Examiners filed.
Feb 5 2014	DISTRIBUTED for Conference of February 21, 2014.
Feb 24 2014	DISTRIBUTED for Conference of February 28, 2014.
Mar 3 2014	Petition GRANTED.
Mar 19 2014	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.
Mar 26 2014	The time to file the joint appendix and petitioner's brief on the merits is extended to and including May 23, 2014.
Mar 26 2014	The time to file respondent's brief on the merits is extended to and including July 30, 2014.
May 6 2014	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondent.

May 23 2014	Joint appendix filed. (Statement of costs filed)
May 23 2014	Brief of petitioner North Carolina State Board of Dental Examiners filed.
May 29 2014	Brief amicus curiae of National Council of Examiners for Engineering and Surveying filed.
May 30 2014	Brief amici curiae of North Carolina State Bar, et al. filed.
May 30 2014	Brief amici curiae of Federation of State Boards of Physical Therapy, et al. filed.
May 30 2014	Brief amici curiae of West Virginia and 22 Other States filed.
May 30 2014	Brief amici curiae of National Governors Association, et al. filed.
May 30 2014	Brief amici curiae of American Dental Association, American Medical Association, et al. filed.
May 30 2014	Brief amicus curiae of California Optometric Association filed.
Jul 9 2014	Record requested from U.S.C.A. 4th Circuit.
Jul 14 2014	Record received from U.S.C.A. 4th Circuit- 1 Box. This record contain one SEALED volume of Appendices.
Jul 21 2014	SET FOR ARGUMENT ON Tuesday, October 14, 2014
Jul 30 2014	Brief of respondent Federal Trade Commission filed.
Aug 5 2014	Record received from United States Federal Trade Commission. The record is electronic. (Not on PACER). A portion of the record is CONFIDENTIAL.
Aug 5 2014	Brief amicus curiae of We All Help Patients, Inc. filed.
Aug 5 2014	Brief amici curiae of American Association of Nurse Anesthetists, et al. filed.
Aug 5 2014	Brief amicus curiae of Neil Averitt filed. (Distributed)
Aug 6 2014	Brief amicus curiae of Association of Dental Support Organizations filed.
Aug 6 2014	Brief amicus curiae of Antitrust Scholars filed. (Distributed)
Aug 6 2014	Brief amicus curiae of Scholars of Public Choice Economics filed.
Aug 6 2014	Brief amici curiae of LegalZoom.com, Inc., et al. filed. (Distributed)
Aug 6 2014	Brief amici curiae of Pacific Legal Foundation and Cato Institute filed. (Distributed)
Aug 6 2014	Brief amicus curiae of Public Citizen, Inc. filed. (Distributed)
Aug 6 2014	Brief amicus curiae of American Antitrust Institute filed. Distributed)
Aug 7 2014	CIRCULATED.
Aug 29 2014	Reply of petitioner North Carolina State Board of Dental Examiners filed. (Distributed)
Sep 9 2014	Motion for leave to file amici brief out of time filed by American Optometric Association, et al.
Oct 2 2014	Motion for leave to file amici brief out of time filed by American Optometric Association, et al. DENIED.
Oct 14 2014	Argued. For petitioner: Hashim M. Mooppan, Washington, D.C. For respondent: Malcolm L. Stewart, Deputy Solicitor General, Department of Justice, Washington, D. C.

PETITION FOR WRIT OF CERTIORARI

13-534

No. _____

In the Supreme Court of the United States

THE NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, for purposes of the state-action exemption from federal antitrust law, an official state regulatory board created by state law may properly be treated as a "private" actor simply because, pursuant to state law, a majority of the board's members are also market participants who are elected to their official positions by other market participants.

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PETITION FOR A WRIT OF CERTIORARI

The North Carolina State Board of Dental Examiners ("the Board") respectfully submits this petition for a writ of certiorari.

OPINIONS

The opinion of the Court of Appeals for the Fourth Circuit (Pet.App. 1a) is reported at 717 F.3d 359. The opinion of the Federal Trade Commission ("FTC") entering summary decision against the Board's state-action defense (Pet.App. 34a) is reported at 151 F.T.C. 607. The FTC's final opinion and order entered against the Board (Pet.App. 69a, 143a) are not yet reported, but are available electronically at 2011 WL 6229615.

JURISDICTION

The Fourth Circuit entered judgment on May 31, 2013, and denied rehearing on July 30, 2013. Jurisdiction to review the judgment rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The appendix reproduces relevant provisions of the Sherman Act and FTC Act, 15 U.S.C. §§ 1, 45, and of North Carolina law establishing and governing the Board, *see generally*, N.C. Gen. Stat. §§ 90-22 *et seq.*, 93B-1 *et seq.*

STATEMENT OF THE CASE

1. This case involves the state-action antitrust exemption recognized in *Parker v. Brown*, 317 U.S. 341 (1943), and its progeny. The exemption provides that "the federal antitrust laws" "should not be read to bar States from imposing market restraints 'as an act of government.'" *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1010 (2013) (quoting *Parker*, 317 U.S. at 352). Allowing States to undertake "anticompetitive actions ... in their governmental capacities as sovereign regulators" reflects "our national commitment to federalism." *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 374 (1991).

Under this state-action doctrine, "when a state legislature adopts legislation, its actions constitute those of the State ... and *ipso facto* are exempt from the operation of the antitrust laws." *Hoover v. Ronwin*, 466 U.S. 558, 567-68 (1984). A "[c]loser analysis is required," however, "when the activity at issue is not directly that of the legislature ...[,] but is carried out by others." *Id.* Private parties may invoke the exemption when two requirements are satisfied: their conduct must (1) be authorized by a "clearly articulated ... state policy" to displace competition, and (2) be "actively supervised" by state officials. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980). In contrast, municipalities need only satisfy the first of those requirements: so long as a "municipality act[s] pursuant to a clearly articulated state policy[,] ... there is no need to require the State to supervise actively the municipality's execution of what is a properly delegated function." *Town of Hallie v. City*

of Eau Claire, 471 U.S. 34, 46-47 (1985). In *Hallie*, this Court further suggested without deciding that, "[i]n cases in which the actor is a state agency, it is likely that active state supervision would also not be required." *Id.* at 46 n.10.

The Fourth Circuit in this case, following the FTC's lead, spurned *Hallie*'s guidance and broke from 70 years of precedent explicating *Parker*'s state-action antitrust exemption. The court below held that an official state regulatory board created by state law is a "private" actor—and thus must satisfy the "active supervision" requirement—simply because, pursuant to state law, a majority of the board's members are also market participants who are elected to their official positions by other market participants. Pet.App. 17a. That decision warrants this Court's review, both because it directly conflicts with decisions of the Fifth and Ninth Circuits as well as an established legal rule applied in the decisions of this Court, and because it raises exceptionally important questions concerning federalism and state regulatory enforcement.

2. "The North Carolina State Board of Dental Examiners ... [is] the agency of the State for the regulation of the practice of dentistry." N.C. Gen. Stat. § 90-22(b). Since 1961, the State Legislature has mandated that the Board contain six practicing dentists elected by the State's licensed dentists, as well as (since 1980) one practicing hygienist elected by the State's licensed hygienists and one consumer member appointed by the Governor. *See id.*

a. As a state agency, the Board has traditional governmental powers that private actors typically do not have: It has quasi-legislative power

"to enact rules and regulations governing the practice of dentistry," backed by criminal penalties. *Id.* § 90-48. It has quasi-executive power to issue licenses for dental practice, *id.* § 90-30(a), and to conduct investigations "into any practices committed in th[e] State that might violate" the laws that it enforces, *id.* § 90-41(d). And it has quasi-judicial power to "issue subpoenas requiring the attendance of persons and the production of papers and records ... in any hearing, investigation or proceeding." *Id.* § 90-27.

Likewise, as a state agency, the Board has traditional governmental duties that private actors typically do not have: It must comply with restrictions concerning ethics, administrative procedures, public records, and open meetings. *Id.* § 93B-5(g). Its conduct is also subject to scrutiny by all three branches of state government. For example, a legislative committee is charged with conducting oversight "to determine if [the Board is] operating in accordance with statutory requirements." *Id.* § 120-70.101(3a). Executive-branch officials receive annual reports summarizing the Board's regulatory activities. *Id.* § 93B-2(a). And judicial review of the Board's conduct is authorized. *See, e.g., Charlotte-Mecklenburg Hosp. Auth. v. North Carolina Indus. Comm'n*, 443 S.E.2d 716, 721 (N.C. 1994) (declaratory relief proper where a state agency acts "in excess of [its] statutory authority").

b. North Carolina law has long made it illegal "to practice dentistry" without a license from the Board. N.C. Gen. Stat. § 90-40. "A person shall be deemed to be practicing dentistry" if, among other things, he "[r]emoves stains, accretions or deposits

from the human teeth." *Id.* § 90-29(b)(2). If the Board concludes that these provisions have been violated, it may refer the matter for criminal prosecution, *id.* § 90-40, or itself bring a civil suit for injunctive relief, *id.* § 90-40.1(a).

In 2003, the Board started receiving complaints that non-dentists were performing the dental practice of stain removal by providing "teeth whitening" services. Pet.App. 75a. As relevant here, such services entail "the application of some form of peroxide to the teeth using a gel or strip," thereby "trigger[ing] a chemical reaction that results in whiter teeth." *Id.* 73a.

After some investigation and discussion, the Board in 2006 enforced the state-law ban on unlicensed stain removal by sending "cease and desist letters" on its official letterhead to non-dentist teeth whitening providers. *Id.* 76a. It also sent letters to shopping mall operators, requesting that they stop leasing kiosks to non-dentist teeth whiteners. *Id.* 77a. It similarly persuaded the North Carolina Board of Cosmetic Art Examiners to notify its licensed salons and spas that teeth whitening required a state dental license. *Id.* 78a. The Board's enforcement efforts caused some non-dentists to stop providing such services. *Id.* 77a-78a.

3. The FTC issued an administrative complaint against the Board under the FTC Act, 15 U.S.C. § 45(a)(2),(b). Pet.App. 78a. The complaint claimed that the Board had violated Section 5 of the FTC Act, 15 U.S.C. § 45(a)(1), by violating Section 1 of the Sherman Act, 15 U.S.C. § 1. Pet.App. 86a-87a. In particular, the complaint alleged that, through the "cease and desist letters" and other official

communications discussed above, the Board had engaged in concerted action with the intent and effect of excluding competition from non-dentist providers of teeth whitening services. *Id.* 78a-79a.

a. The Board moved to dismiss based on state-action immunity, and Complaint Counsel moved for partial summary decision on that issue. *Id.* 36a. The FTC rejected the Board's immunity defense. *Id.* 68a.

The FTC first assumed that the Board had satisfied the requirement that its conduct must be authorized by a "clear[ly] articulat[ed]" state policy to displace competition, given the state-law ban on unlicensed stain removal. *See id.* 47a n.8. Although Complaint Counsel had questioned whether that ban covered the teeth whitening services at issue and whether the Board was authorized to enforce that ban in the manner that it had, *see id.* 48a, the FTC avoided those state-law issues. *See Omni*, 499 U.S. at 372 (holding that the "concept of authority" under the state-action exemption is "broader than what is applied to determine the legality of the municipality's action under state law").

Then, however, the FTC broke new ground by deciding that the Board also had to satisfy the requirement that its conduct must be "actively supervised by the State itself," notwithstanding that the Board itself is an official state agency. Pet.App. 46a-47a. The FTC held in particular that "a state regulatory body that is controlled by participants in the very industry it purports to regulate" must be actively supervised by a component of the State that is not. *See id.* 58a. The FTC asserted that, "when determining whether the state's active supervision is

required, the operative factor is a tribunal's degree of confidence that the entity's decision-making process is sufficiently independent from the interests of those being regulated." *Id.* 49a. The FTC's conclusion was "reinforced" by the fact that the Board's members "are elected directly by ... the other licensed dentists in North Carolina." *Id.* 59a. Notably, though, that fact was not necessary to the FTC's decision, which treated as sufficient that a majority of the Board's members are also practicing dentists, regardless of the method that state law provides for their selection. *See, e.g.*, *id.* 35a-36a, 58a, 68a, 81a.

The FTC further concluded that no other state entity had actively supervised the Board's official communications to non-dentists regarding teeth whitening. *Id.* 68a. The FTC reasoned that, while the Board was subject to "generic oversight" by various state actors, *see id.* 63a-68a, none of them had performed the type of "pointed reexamination" of the Board's conduct that the FTC deemed necessary under the active-supervision standard, *see id.* 61a-63a.

b. After a merits hearing, the FTC entered a final opinion and order against the Board. *Id.* 71a.

The FTC first ruled that the Board was legally capable of engaging in concerted action to restrain trade because its members had separate economic interests, *id.* 94a-100a, and also that the Board's members in fact had conspired to restrain trade rather than each acting independently, *id.* 100a-104a. The FTC then held that the Board had unreasonably restrained trade by using its official communications to deter teeth whitening by non-dentists. *Id.* 104a. In so holding, the FTC repeatedly

noted that the Board's communications had the tendency and effect of excluding competition due to the Board's official status and apparent authority. *See, e.g.*, *id.* 107a, 112a-113a, 128a-129a. And the FTC rejected the Board's asserted procompetitive justifications. *Id.* 114a-125a.

The FTC's final order prohibits the Board from directing non-dentists to cease teeth whitening services and from instructing non-dentists or their business partners that unlicensed teeth whitening is illegal. *See id.* 145a-147a. It also compels the Board to provide corrective notifications and to follow new reporting and inspection requirements. *See id.* 148a-151a, 153a-155a.

The FTC's final order disclaims any interference with the Board's authority to investigate the unlicensed practice of dentistry or to initiate judicial proceedings. *See id.* 147a. It also permits the Board to communicate its belief that unlicensed teeth whitening is illegal as well as its *bona fide* intent to initiate judicial proceedings, so long as the communications include an FTC-drafted disclosure emphasizing that the Board itself lacks the authority to declare unlicensed teeth whitening unlawful or to enjoin that practice. *See id.* 147a-148a, 152a. These provisos in the FTC's final order, however, do not purport to exempt any of the Board's actions from the FTC's state-action decision or to exempt them from federal antitrust scrutiny (absent active state supervision) if later challenged by the FTC or private parties. *See id.* 35a-36a, 81a.

4. The Board filed a petition for review under the FTC Act, 15 U.S.C. § 45(c). Pet.App. 4a. The Fourth Circuit denied the petition. *Id.*

As relevant here, the Fourth Circuit "agree[d] with the FTC that state agencies in which a decisive coalition ... is made up of participants in the regulated market, who are chosen by and accountable to their fellow market participants," must satisfy the active-supervision requirement. *Id.* 14a (internal quotation marks omitted). Like the FTC, the Fourth Circuit asserted the need to ensure that "the State has exercised sufficient independent judgment and control" over such state agencies, even where their conduct is authorized by a clearly articulated anticompetitive state policy. *See id.* 15a. In sum, the court held that, "when a state agency is operated by market participants who are elected by other market participants, it is a 'private' actor" for the state-action exemption. *Id.* 17a.

Judge Keenan wrote a brief concurrence, which emphasized that this case involved a state agency where the market-participant members were "elected by other private participants in the market," rather than "appointed or elected by state government officials." *Id.* 29a-31a.

5. Rehearing en banc was denied. *Id.* 157a.

REASONS FOR GRANTING THE PETITION

At the FTC's behest, the Fourth Circuit radically departed from 70 years of settled antitrust law by holding that a state agency—the North Carolina State Board of Dental Examiners—must be actively supervised by another state entity to receive state-action immunity. Notably, the decision below does not dispute that: (1) the Board is created by state law as the official state agency to regulate dental practice within the state; (2) the Board has state-law powers and duties that state agencies traditionally have and that private actors typically do not have; (3) the Board's enforcement steps against non-dentist teeth whiteners were taken pursuant to a clearly articulated state policy to displace competition in dentistry; and (4) the Board's challenged communications excluded competition only because they carried the State's imprimatur. *Supra* at 3-9. The Fourth Circuit's unprecedented holding was that the Board nonetheless is a "private" actor that must satisfy the "active supervision" requirement, simply because, pursuant to state law, a majority of the Board's members are also market participants who are elected to their official positions by other market participants. Pet.App. 17a.

The decision below warrants this Court's review. It is contrary to well-established precedent that consistently applies a basic legal rule: an official state entity's enforcement of a clearly articulated anticompetitive state policy is a sovereign act of State government and thus exempt from federal antitrust law—without regard to the public officials' independence from private interests, method of selection, or supervision by other state entities. The

decision is also contrary to the basic principles of federalism upon which state-action antitrust immunity is based: federal regulators have no license to condition a State's sovereign right to adopt anticompetitive state laws on the manner in which the State exercises its equally sovereign right to choose who shall be the public officials that enforce those laws and how they shall do so.

I. The Fourth Circuit's decision directly conflicts with the Fifth Circuit's decision in *Earles v. State Board of Certified Public Accountants of Louisiana*, 139 F.3d 1033 (5th Cir. 1998), and the Ninth Circuit's decision in *Hass v. Oregon State Bar*, 883 F.2d 1453 (9th Cir. 1989). Each of those cases held that the active-supervision requirement does not apply to an official state agency's acts even though the agency's officers there, like the Board's members here, were required under state law also to be private market participants whose selection for office was caused by other private market participants. *See Earles*, 139 F.3d at 1035, 1040-42; *Hass*, 883 F.2d at 1459-61.

II. The Fourth Circuit's decision also conflicts with the state-action jurisprudence established by this Court's decisions in *Parker*, *Hallie*, and *Omni*. *Supra* at 2-3. *First*, *Parker* held that acts of a state agency when enforcing an anticompetitive state law are sovereign acts of state government that are exempt from federal antitrust law; this Court thus granted immunity to a state agency that, like the Board here, was operated under state law by officers who were also private market participants and not actively supervised by other public officers. *See* 317 U.S. at 346-47, 350-52. *Second*, *Hallie* held that the

State must actively supervise anticompetitive activity that it has clearly authorized only where necessary to ensure that the activity is the State's own rather than merely private conduct that the State has blessed; this Court thus declined to require active supervision of municipalities, which, like the Board here, are indisputably public entities through which the State effectuates its own sovereign conduct, regardless of the amount of supervision. *See* 471 U.S. at 46-47. *Third*, *Omni* held that public regulatory action is not transformed into private conduct merely because the regulating public officials have shared interests with regulated private persons; this Court thus refused to create a conspiracy exception to state-action immunity for public officials who, like the Board members here (according to the FTC), could receive financial and electoral benefits by taking anticompetitive regulatory steps favoring certain private interests. *See* 499 U.S. at 367, 374-79.

III. The Fourth Circuit's departure from this established precedent is exceptionally important. "[F]ederal legislation threatening to trench on the States' arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State's chosen disposition of its own power." *Nixon v. Missouri Mun. League*, 541 U.S. 125, 140 (2004); *accord Omni*, 499 U.S. at 372, 374-75. *Parker* thus declined to interpret federal antitrust law to interfere with "a state's control over its officers and agents," 317 U.S. at 351, as a fundamental principle of federalism is that "a State defines itself as a sovereign" "[t]hrough the structure of its government[] and the character of those who exercise

government authority," *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). In contrast, the decision below strips a state agency's officers of antitrust immunity where the state legislature chooses to select and supervise them in a manner that renders their regulatory actions less independent from private interests than federal authorities deem preferable. Moreover, this harm to state sovereignty is exacerbated by the serious threat posed by the decision below to the effective enforcement of the state-law regimes that have long governed regulated professions, such as dentists, doctors, lawyers, and accountants. Forcing States to reduce the level of regulatory involvement by practicing professionals deprives agencies of valuable expertise. And forcing States to increase the supervision of their own expert agencies is both intrusive and impractical.

Accordingly, certiorari should be granted.

I. THE FOURTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF OTHER FEDERAL CIRCUIT COURTS APPLYING THE ANTITRUST STATE-ACTION DOCTRINE

Both the Fifth Circuit in *Earles* and the Ninth Circuit in *Hass* squarely refused to apply the active-supervision requirement to an official state agency that, like the Board here, was operated pursuant to state law by state officers who were also market participants whose selection for office was caused by other market participants. Indeed, the decision below is the only federal appellate decision in the 70 years since *Parker* to treat a *bona fide* state regulatory agency as a "private" actor subject to the active-supervision requirement.

A. The Fifth Circuit's Decision In *Earles*

In *Earles*, the Fifth Circuit expressly held that a regulation promulgated by the official state agency that regulated public accountants was "exempted from the active-supervision prong" because of "the public nature of the [agency's] actions," "[d]espite the fact" that the agency was "composed entirely of [accountants] who compete in the profession they regulate." 139 F.3d at 1041. Citing *Hallie*, the court applied the legal rule that, "[s]o long as [such an agency] is acting within its authority and pursuant to a clearly established state policy, there is no need for active supervision of the exercise of properly delegated authority" to displace competition. *Id.*

The Fourth Circuit's decision below directly conflicts with the Fifth Circuit's decision in *Earles*. Just like the agency's regulation in *Earles*, "the Board's actions" here were of a "public nature," *id.*, as they were *official communications* concerning non-dentist teeth whiteners, *supra* at 5. Thus, under the legal rule applied in *Earles*, "there [was] no need [here] for active supervision of [the Board's] exercise of properly delegated authority" to displace competition, "[d]espite the fact that the Board is composed [primarily of dentists] who compete in the profession they regulate." *See* 139 F.3d at 1041.

To be sure, in *Earles*, the practicing accountants who also served as the agency's controlling officials were not, as here, elected to office under state law by their fellow market participants. *See id.* at 1035. But "the Society of Louisiana Certified Public Accountants" still *caused* the selection of the agency's accountant members in *Earles*: pursuant to state law, they nominated the *exclusive* "slate of

candidates" from which those members were "chosen by the governor" and "confirmed by the state senate." *Id.* Even more importantly, under the Fifth Circuit's legal rule in *Earles*, the only relevant fact is the "public nature" of the agency's actions. *See id.* at 1041. The *Earles* court entirely rejected the relevance of the agency's market-participant membership, and thus its analysis did not even arguably turn on the particular method under state law for selecting those members for office, let alone on the slight difference between exclusive nomination slates and elections. *See id.* In short, the legal rule applied in *Earles* for when active supervision is not required fully applies to the acts of the elected Board members here.

Although that conclusion alone shows a conflict on the elected-member scenario here, the conflict also extends to the nominated-member scenario in *Earles*. Notably, the Fourth Circuit did not itself distinguish *Earles* based on the particular selection method there; rather, it generically characterized the Fifth Circuit's decision as fact-bound without even attempting to identify any particular distinguishing fact. Pet.App. 16a-17a n.6. Moreover, the Fourth Circuit's purported concern about the elections required under state law here was that the Board's market-participant members are "chosen by and accountable to their fellow market participants." *See id.* 14a. And the Board's dentist members still would be "chosen by and accountable to" their fellow dentists if state law instead had required that they be selected from an exclusive slate of nominees provided by the dentists' professional association. In short, the legal rule applied by the Fourth Circuit for when active supervision is required would fully apply

to the acts of the Board members here even if they had been selected for office from an exclusive slate of nominees, as in *Earles*. *See also infra* at 22-24 (further showing that the Fourth Circuit's core rationale does not turn on selection methods *at all*).

B. The Ninth Circuit's Decision In *Hass*

Hass applied the same legal rule as *Earles* applied—and on the same facts as here. In *Hass*, the Ninth Circuit held that an official state agency that regulated lawyers "need not satisfy the 'active supervision' requirement." 883 F.2d at 1461. Citing *Hallie*, the court applied the legal rule that a "clearly articulated ... state policy" is sufficient to avoid "a *private* [anticompetitive] arrangement" when "a public body" is involved. *See id.* at 1460-61.

Critically, *Hass* treated the state bar there as a "public body" even though that agency was controlled by a fifteen-member board of governors, twelve of whom were also *lawyers elected by the other lawyers in the state*. *Id.* at 1460 & n.3. Indeed, directly contrary to the decision here, *Hass* held that the election of the board's lawyer-members by other lawyers *affirmatively supported* state-action immunity, since the elections served as a "'check' [on] the actions of the [b]oard." *See id.*

Accordingly, even on the narrowest reading of the Fourth Circuit's decision below, its holding squarely conflicts with the Ninth Circuit's holding in *Hass*. There is no basis for the Fourth Circuit's *ipse dixit* assertion that *Hass* was a fact-bound decision that it could distinguish without even attempting to

identify any particular distinguishing fact. Pet.App. 16a-17a n.6.[1]

C. No Other Decision Of A Federal Circuit Court Supports The Fourth Circuit's Decision

Not only does the Fourth Circuit's decision conflict with *Earles*, *Hass*, and the decisions cited here in footnote one, but it is the sole outlier from an otherwise consistent body of federal appellate decisions. Although the court below suggested otherwise, *see* Pet.App. 16a, the three decisions it cited are inapposite.

FTC v. Monahan, 832 F.2d 688 (1st Cir. 1987), and *Washington State Electrical Contractors Association, Inc. v. Forrest*, 930 F.2d 736 (9th Cir. 1991) (per curiam), were interlocutory opinions that merely allowed additional fact-finding without ruling on the merits. *See Monahan*, 832 F.2d at 689-90; *Forrest*, 930 F.2d at 737. Indeed, the Ninth Circuit panel in *Forrest* could not have held that active supervision was required for the agency there, given the binding earlier panel opinion in *Hass*.

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[1] Other federal circuit courts have reached similar results as *Hass* and *Earles*. *See, e.g., Cine 42nd St. Theater Corp. v. Nederlander Org., Inc.*, 790 F.2d 1032, 1047 (2d Cir. 1986) (holding that, because a corporate governmental agency was "by statute a political subdivision of the state, ... its interests must be defined as public rather than private, and consequently, the active state supervision requirement is unnecessary"); *Brazil v. Arkansas State Bd. of Dental Examiners*, 759 F.2d 674, 675 (8th Cir. 1985) (per curiam), *aff'g* 593 F. Supp. 1354, 1362-63, 1368-69 (E.D. Ark. 1984) (same as *Earles*); *Gambrel v. Kentucky Bd. of Dentistry*, 689 F.2d 612, 614-15, 620 (6th Cir. 1982) (pre-*Hallie* case effectively exempting a state agency structured as in *Earles* from the active-supervision requirement, by deeming it satisfied simply because the agency was enforcing a clearly articulated anticompetitive state statute).

Asheville Tobacco Board of Trade, Inc. v. FTC, 263 F.2d 502 (4th Cir. 1959), did not involve an official state agency. Instead, it involved a local "tobacco board of trade"—namely, "a non-stock corporation" that "constitute[d] a contract[ual]" association "organized primarily for the benefit of those engaged in the business," with "[m]embership ... open to warehousemen and purchasers of leaf tobacco." *Id.* at 505, 509. Although some state-court decisions had in *dicta* "referred to [such] boards as 'administrative commissions,'" *see id.* at 508, the Fourth Circuit in *Asheville* recognized that those boards were not *bona fide* "State agenc[ies]," *see id.* at 509-10. The private trade boards there, unlike the state Board here, did not have *any* of the state-law duties that true governmental bodies typically have. *Compare id.* (lack of reporting requirements or other state supervision of local trade boards), *with supra* at 3-4 (traditional state-law duties of Board here).

In sum, among the federal circuit court decisions in the 70 years since *Parker*, the Fourth Circuit's decision here is the only one ever to treat an official state board as a "private" actor subject to the active-supervision requirement, and the only one even to suggest that the state-law method for selecting the board's members who are also market participants is legally relevant to state-action antitrust immunity. In contrast, the Fifth Circuit in *Earles* and the Ninth Circuit in *Hass* refused to subject an official state agency to the active-supervision requirement, regardless of whether, and even though, the agency's officers were also private market participants whose selection for office under state law was caused by other private market participants. This Court thus should grant review to resolve the circuit conflict.

II. THE FOURTH CIRCUIT'S DECISION CONFLICTS WITH A WELL-SETTLED LEGAL RULE UNDER THIS COURT'S ANTITRUST STATE-ACTION DECISIONS

The reason why the Fourth Circuit's decision is an outlier is that it conflicts with a well-settled legal rule developed by this Court in its antitrust state-action decisions over the past 70 years—a rule established by *Parker*, confirmed by *Hallie*, and underscored by *Omni*. Specifically, the rule applied in those cases is that an official state entity's enforcement of a clearly articulated anticompetitive state policy is a sovereign act of State government and thus exempt from federal antitrust law, without regard to the public officials' independence from private interests, method of selection, or supervision by other state entities. Indeed, no decision of this Court has even suggested any possible deviation from that consistently applied legal rule.

A. This Court's Decision In *Parker*

1. In *Parker*, this Court established the legal rule that federal antitrust law does not "restrain a state or its officers or agents from activities directed by its legislature." 317 U.S. at 350-51. Both that rule and its limits were based on the principles of federalism that underlie our "dual system of government." *Id.* at 351.

On one hand, this Court emphasized that, because "the states are sovereign, ... an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Id.* On the other hand, this Court admonished that respect for state sovereignty does not go so far as to permit "a state [to] give immunity"

to private "individuals" who are violating federal antitrust law merely "by authorizing them to violate it[] or by declaring that their action is lawful." *Id.*

The *Parker* Court then applied that distinction between "individual and ... state action" to the conduct at issue, *id.* at 352, which was a scheme of agricultural "programs" designed "to restrict competition among the growers and maintain prices in the distribution of their commodities to packers," *id.* at 346. In particular, state law authorized a committee of private producers to formulate a program establishing the exclusive terms on which a commodity could be sold in an area, and that program became effective upon approval from both a super-majority of the area's producers *and* the State's "Agricultural Prorate Advisory Commission." *Id.* at 346-47; *see also id.* at 347, 352 (the Commission's actions were not actively supervised by any other state entity).

Parker concluded that "[t]he state in adopting and enforcing the prorate program ... imposed the restraint as an act of government which [federal antitrust law] did not undertake to prohibit." *Id.* at 352. It was "plain that the prorate program ... was never intended to operate by force of individual agreement," but rather "derived its authority and its efficacy from the legislative command of the state." *Id.* at 350. Specifically, "[a]lthough the organization of a prorate zone is proposed by producers, and a prorate program ... must also be approved by referendum of producers, *it is the state, acting through the Commission*, which adopts the program and which enforces it ... in the execution of a governmental policy." *Id.* at 352 (emphasis added).

The rule of decision below for when state-action immunity is unwarranted thus conflicts with *Parker*'s legal rule. The Fourth Circuit here denied immunity to the state Board because it did not deem the Board "sufficient[ly] independent" from private market participants given how it was structured and supervised. *See* Pet.App. 14a-15a. In contrast, this Court in *Parker* granted immunity to the state Commission members, without reference to such considerations, simply because federal antitrust law does not "restrain a state or its officers" when they are performing "activities directed by [the] legislature." 317 U.S. at 350-51.

2. The conflict between the legal rules applied in the decision below and *Parker* is underscored by the fact that the members of the state Commission in *Parker* were *not* all entirely disinterested public officials. As made clear by the statute in *Parker* that this Court cited without further discussion, *six of the nine* Commission members were *required* also to be engaged "in the production of agricultural commodities as their principal occupation." *See id.* at 346 (citing 1939 Cal. Stat. ch. 894, § 3, p. 2488); *see also* John Lopatka, *The State of "State Action" Antitrust Immunity: A Progress Report*, 46 La. L. Rev. 941, 948 & n.21 (1986).

Given these facts, the decision below even more starkly conflicts with *Parker*. The Fourth Circuit here held that the state Board, with its controlling members who are also market participants, is a "private" actor that needs "active supervision" by a disinterested state entity to ensure that "the State has exercised sufficient independent judgment and control." *See* Pet.App. 15a. In contrast, this Court in

Parker held that the state Commission, with its controlling members who were also market participants, *was* "the state" in "execut[ing] ... a government policy," and, therefore, that its conduct was itself an exempt "act of government," despite the lack of active supervision. *See* 317 U.S. at 352.

To be sure, the Commission's market-participant officials in *Parker* were appointed by the State's Governor and confirmed by its Senate, rather than, as here, elected to office under state law by other market participants. *See id.* at 346. But, under this Court's legal rule in *Parker*, the only relevant fact is that the State's "officers or agents" are performing "activities directed by its legislature," because "our dual system of government" requires respect for a State's "sovereign" choices concerning how to exercise "control over its officers and agents." *See id.* at 350-51. This Court's analysis thus did not even arguably turn on the particular method under state law for selecting the Commission's members for office—*i.e.*, by appointment rather than election. *See id.* at 346, 350-52. In short, the legal rule applied in *Parker* for when active supervision is not required fully applies to the acts of the elected Board members here.

Although that conclusion alone shows a conflict on the elected-member scenario here, the conflict also extends to the appointed-member scenario in *Parker*. Below, both the panel and concurring opinions nominally emphasized that the Board's dentist members are elected; but those opinions conspicuously failed to provide *any explanation* why the state-law selection method is legally relevant even under their own (erroneous) reasoning, much

less why a change in state law from election to appointment would legally transform the Board's market-participant members from "private" actors into "state" officers. *See* Pet.App. 14a-17a, 29a-31a. To the contrary, the Fourth Circuit's analysis of why the Board lacked "sufficient independen[ce]" to constitute "the State" rather than "a private actor" turned *solely* on the premise that the Board's dentist members were engaged in "financially interested action" that "benefit[ted] [their] own membership." *See id.* 14a-15a. And whatever overlapping economic interests may exist between the Board's dentist members and other practicing dentists, they exist equally whether those members are selected for office under state law through appointment by the Governor or through election by other dentists. In short, the Fourth Circuit's essential legal reasoning for when active supervision is required would fully apply to the acts of the Board members here even if they had been selected for office by gubernatorial appointment, as in *Parker*.

Tellingly, even the secondary sources upon which the Fourth Circuit chiefly relied advocate treating a state agency as a "private" actor *whenever* its controlling officials are also market participants. For example, while the decision below emphasized that it was "agree[ing] with the FTC," *id.* 14a, 17a, the FTC treated the election of the Board's market-participant members only as "reinforc[ing]" its "conclusion," *id.* 59a, *not as limiting it.* The FTC thus consistently stated its holding in broad terms that did not depend on the particular method for selecting the Board's members who were also market participants: "because the Board is controlled by practicing dentists, the Board's challenged conduct

must be actively supervised by the [S]tate for it to claim state action exemption from the antitrust laws." *Id.* 68a, 81a.[2] Likewise, while the decision below quoted the Areeda and Hovenkamp treatise, it inserted the election qualifier *after* the quotation, because the treatise's broader "[r]ecommendation[]" is to presumptively require active supervision for *all* state agencies controlled by officers who are also market participants, without regard to selection method. *Compare id.* 14a, *with* Phillip Areeda & Herbert Hovenkamp, 1A *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 227b, at 501 (3d ed. 2009); *see also* Pet.App. 14a (citing Einer Elhauge, *The Scope of Antitrust Process*, 104 Harv. L. Rev. 667, 689 (1991), which broadly advocated for *always* requiring active supervision of financially interested public officials).

3. In sum, neither the rule of *Parker*, nor the essential reasoning of the Fourth Circuit, nor the secondary sources cited below depend in any way upon the state-law method for selecting the controlling officers of a state agency when they are also market participants. Thus, there is a square conflict between the legal rules for state-action immunity applied by the decision below and by

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[2] *Accord* Pet.App. 35a-36a ("In the case before us, the decisive majority of the Board ... earns a living by practicing dentistry.... We conclude that given the Board's obvious interest in the challenged restraint, the state must actively supervise the Board in order for the Board to claim state action protection from the antitrust laws."); *id.* 58a ("We accordingly hold that a state regulatory body that is controlled by participants in the very industry it purports to regulate must satisfy [the 'active supervision' requirement] to be exempted from antitrust scrutiny under the state action doctrine.").

Parker on the specific facts of state agencies whose controlling officers are also market participants—notwithstanding that the Fourth Circuit included within the statement of its holding the immaterial fact that the state-law method for selecting the controlling market-participant members here happens to be elections by other market participants rather than appointments by the Governor. And more generally, by imposing the active-supervision requirement on public officers of state agencies who are also private market participants, the Fourth Circuit flouted this Court's core rule in *Parker* that federal antitrust law does not "restrain" the State's "officers" when they are performing "activities directed by its legislature." *See* 317 U.S. at 350-51.

B. This Court's Decision In *Hallie*

Following *Parker*, this Court in *Hallie* confirmed the legal rule that "there is no need to require the State to supervise actively" an official state entity that is "act[ing] pursuant to a clearly articulated state policy." *See* 471 U.S. at 47. While the state entity at issue on the facts of *Hallie* was a municipality, this Court emphasized that its legal conclusion there "likely" applied to "state agenc[ies]" as well. *See id.* at 46-47 & n.10.

In so holding, *Hallie* initially observed that "the requirement of active state supervision serves essentially an evidentiary function: it is one way of ensuring that the actor is engaging in the challenged conduct pursuant to state policy." *Id.* at 46. This Court of course recognized that the *mere existence* of an anticompetitive state policy must already be shown under the clear-articulation requirement. *See id.* at 47. It thus explained that the active-

supervision requirement addresses a distinct aspect of the state-policy question that is not resolved by the clear-articulation requirement: namely, whether the anticompetitive state policy "further[s] ... interests" that are properly treated as truly "governmental" rather than merely "private." *See id.*

In particular, *Hallie* reaffirmed that the specific purpose of the active-supervision requirement is "to prevent a State from circumventing [federal antitrust law] 'by casting a gauzy cloak of state involvement over what is essentially a private [anticompetitive] arrangement.'" *Id.* at 46-47 (quoting *Midcal*, 445 U.S. at 106); *see also, e.g.*, *Midcal*, 445 U.S. at 105-06 (denying immunity where "[t]he State simply authorize[d] price setting and enforce[d] the prices established by private parties"). The active-supervision requirement thus implements *Parker*'s admonition that federal respect for state sovereignty does not warrant immunizing private parties when the State merely "authoriz[es] them to violate [federal antitrust law]," but rather only when the State uses them as part of "the execution of a governmental policy." *See* 317 U.S. at 351-52. Simply put, active supervision is what legally transforms private action into immune state action. *See Hallie*, 471 U.S. at 46-47.

Given the active-supervision requirement's limited role, *Hallie* declared it inapplicable to the actions of municipalities. *See id.* at 47. *Hallie* recognized that, once the State clearly authorizes a municipality to act anticompetitively, "there is little or no danger" that the State is merely immunizing "a *private* [anticompetitive] arrangement." *Id.* The state-sanctioned anticompetitive acts of municipal

officers hardly reflect "a gauzy cloak of state involvement" over what are truly the acts of private parties, *see Midcal*, 445 U.S. at 106; rather, they clearly constitute "sovereign" "act[s] of [state] government," *see Parker*, 317 U.S. at 352, in the "execution of what is a properly delegated function," *see Hallie*, 471 U.S. at 47.

The rule of decision below for when active supervision is required thus conflicts with *Hallie*'s legal rule. The Fourth Circuit here required active supervision of the state Board's actions to ensure that they were taken with "sufficient independen[ce]" from private dentists. *See* Pet.App. 15a. In contrast, this Court in *Hallie* did not require active supervision of municipalities because there was "little or no danger" that the State was merely immunizing "a *private* [anticompetitive] arrangement" through "a gauzy cloak of state involvement." *See* 471 U.S. at 46-47. In other words, the proper question under *Hallie* is not whether official conduct is being taken independently from private market participants, but whether private conduct is being taken independently from the State—active supervision is required only in the latter situation under *Hallie*, contrary to the decision below.

Here, there is no question whether private conduct is being taken independently of the State, because the only conduct involved is the Board's unquestionably official conduct. As the FTC recognized (Pet.App. 40a-41a), the Board is the "agency of the State for the regulation of the practice of dentistry." N.C. Gen. Stat. § 90-22(b). Accordingly, under state law, the Board has powers

and duties that public agencies traditionally have and that private parties typically do not have. *Supra* at 3-4. Furthermore, as the FTC assumed, the Board's communications about non-dentist teeth whiteners were undertaken pursuant to a state law that clearly displaces competition by non-dentists. *Supra* at 6. Last but not least, *the State's imprimatur* is what the FTC found caused those communications to have the tendency and effect of excluding competition from non-dentists.[3]

In sum, the Board's official status is not even arguably a mere "gauzy cloak" thrown over "private part[ies]" who are "involved in a *private* price-fixing arrangement." *See Hallie*, 471 U.S. at 47. Instead, the Board is a *bona fide* state agency "executi[ng] ... a properly delegated function." *See id.* By nevertheless holding that the Board must be actively supervised to obtain state-action immunity, the Fourth Circuit contravened *Hallie*.

C. This Court's Decision In *Omni*

Following *Parker* and *Hallie*, this Court in *Omni* rejected a contrary legal rule that "government *regulatory* action may be deemed private—and therefore subject to antitrust liability—when it is taken pursuant to a conspiracy with private parties."

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[3] *See* Pet.App. 107a ("The Board viewed [its 'cease and desist'] letters as having the force of law and recipients of these communications had a similar understanding."); *id.* 112a ("[S]tate agencies, such as the Board, are likely to have greater ability to enforce restrictions than private organizations."); *id.* 128a (concluding that the Board "ha[d] market power" "to exclude competition" based on its "authority to regulate and discipline dentists" and "its perceived authority to exclude non-dentists from providing teeth whitening services").

499 U.S. at 374-75. Specifically, this Court reversed the Fourth Circuit's creation of a "conspiracy exception" to *Parker* immunity for cases where self-interested public officials agree with private actors to restrain competition. *Id.* at 374.

In *Omni*, the plaintiff claimed that "City Council members [had] received advantages," including campaign contributions, for "protect[ing] [a competitor's] monopoly position" through favorable zoning ordinances. *Id.* at 367. The plaintiff thus argued that, even if the zoning ordinances were authorized by a clearly articulated anticompetitive state policy (as this Court so held, *id.* at 370-73), state-action immunity still should be denied, simply because the public officials involved shared financial interests with private persons when enforcing that anticompetitive policy. *See id.* at 374.

The *Omni* Court, however, responded that "[t]here is no such conspiracy exception." *Id.* It held that, regardless of public officials' alleged motives, "[t]he rationale of *Parker* was that, in light of our national commitment to federalism, the general language of the [federal antitrust laws] should not be interpreted to prohibit anticompetitive actions by the States *in their governmental capacities as sovereign regulators*." *Id.* (emphasis added).

In so holding, *Omni* explained that inquiring into whether public officials have acted with "selfish or corrupt motives" would entail "the sort of deconstruction of the governmental process and probing of the official 'intent' that [this Court has] consistently sought to avoid." *See id.* at 376-77; *see also, e.g.*, *Withrow v. Larkin*, 421 U.S. 35, 55 (1975) (citing *United States v. Morgan*, 313 U.S. 409, 421

(1941)). Accordingly, *Parker* and other state-action cases "unmistakably hold that, where the action complained of ... [is] that of the State itself, the action is exempt from antitrust liability regardless of the State's motives in taking the action." *Hoover*, 466 U.S. at 579-80. And *Omni* confirmed that this "*ipso facto* exempt[ion]" extends to public officials whose anticompetitive conduct is clearly authorized by state policy, whether or not they are disinterested. *See* 499 U.S. at 374, 378-79; *see also City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 411 n.41 (1978) (plurality opinion) ("We think it obvious that the fact that the ancillary effect of [a state agency's] policy, or even the conscious desire on its part, may have been to benefit the lawyers it regulated cannot transmute the [agency]'s official actions into those of a private organization.").

The rule of decision below deeming relevant the personal interests of public officers thus conflicts with *Omni*'s legal rule. The Fourth Circuit here imposed the active-supervision requirement on a state agency controlled by officials who are also market participants in order to ensure that "the State has exercised sufficient independent judgment and control." *See* Pet.App. 15a. In contrast, this Court in *Omni* held that any failure by public officials to exercise independent judgment on behalf of the State when enforcing anticompetitive state law—whether motivated by their own personal economic interests or any other reason—is "unrelated to th[e] purposes" of the federal antitrust laws, which are "not directed to th[e] end" of perceived "good government." *See Omni*, 499 U.S. at 378-79. Indeed, comparing the facts of the two cases starkly underscores the legal conflict: whatever

abstract "independence" concerns may arise here because state law requires that Board members must also be practicing dentists who are elected to office by other dentists, *see* Pet.App. 14a-15a, they pale in comparison to the concrete "independence" concerns that arose from the allegations of outright "bribery" that *Omni* nonetheless deemed legally irrelevant, *see* 499 U.S. at 367, 378-79.

D. No Other Decision Of This Court Supports The Fourth Circuit's Decision

While the Fourth Circuit completely ignored the conflict with *Parker*, *Hallie*, and *Omni*, it tried to justify its unprecedented holding by citing two other decisions of this Court. *See* Pet.App. 14a-15a. But neither case is apposite.

First, the Fourth Circuit cited *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), to support the claim that the Board here may not "foster anticompetitive practices for the benefit of its members" without active state supervision. *See id.* at 791. But *Goldfarb* did not hold that an official state agency must satisfy the active-supervision requirement. Rather, *Goldfarb* held that the State Bar there had not satisfied the "threshold" clear-articulation requirement, "because it [could not] fairly be said that the State of Virginia through its Supreme Court Rules required [the Bar's] anticompetitive activities." *Id.* at 790; *accord S. Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 60-61 (1985) (treating *Goldfarb* as a clear-articulation case, not as an active-supervision case). *Goldfarb* thus is irrelevant here, because (as the FTC assumed) the clear-articulation requirement is satisfied. *Supra* at 6.

Second, the Fourth Circuit cited *FTC v. Ticor Title Insurance Co.*, 504 U.S. 621 (1992), to support the claim that the State here must "exercise[] sufficient independent judgment and control" over the Board. *See id.* at 634. But *Ticor* did not present the question whether an official state agency must be actively supervised by another state entity to ensure sufficient independence from regulated private persons. Rather, the defendants in *Ticor* themselves were "private entities organized by title insurance companies to establish uniform rates for their members." *Id.* at 628. Thus, *Ticor*'s disapproval of their "independence" was simply a reaffirmation of the settled rule that the anticompetitive conduct of "private parties" must be actively supervised in order to ensure that it is "the State's own," *id.* at 634-35, not just "a *private* price-fixing arrangement" with "a gauzy cloak of state involvement," *Hallie*, 471 U.S. at 46-47. Indeed, contrary to the Fourth Circuit's further inquiry into whether *public officials* are sufficiently *disinterested*, the *Ticor* Court disavowed any suggestion that requiring active supervision is proper "to determine whether the State has met some normative standard ... in its regulatory practices." *See* 504 U.S. at 634-35.

In sum, neither *Goldfarb* nor *Ticor* remotely supports the Fourth Circuit's radical departure from the clear legal rule recognized and repeatedly reaffirmed by this Court's antitrust state-action jurisprudence—namely, an official state entity's enforcement of a clearly articulated anticompetitive state policy is a sovereign act of State government and thus exempt from federal antitrust law without any further showing. This Court thus should grant review to reverse the violation of its legal rule.

III. THE FOURTH CIRCUIT'S DECISION IS EXCEPTIONALLY IMPORTANT BECAUSE OF ITS HARMFUL IMPACT ON THE STATES' SOVEREIGN REGULATORY REGIMES

The Fourth Circuit's novel and erroneous decision violates the fundamental principles of federalism that underlie the state-action antitrust exemption, by subjecting to federal scrutiny a State's sovereign choices concerning how to structure its own regulatory agencies and thereby enforce its own anticompetitive policies. This Court's review is thus essential, especially given the grave harms posed.

As noted, *Parker* is grounded in "our national commitment to federalism." *Omni*, 499 U.S. at 374. In our system of dual sovereigns, "a State defines itself as a sovereign" "[t]hrough the structure of its government[] and the character of those who exercise government authority." *Gregory*, 501 U.S. at 460. Accordingly, "federal legislation threatening to trench on the States' arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State's chosen disposition of its own power." *Nixon*, 541 U.S. at 140.

Consistent with these principles, this Court has rejected interpretations of *Parker* that would "undermin[e] the very interests of federalism it is designed to protect." *See Omni*, 499 U.S. at 372, 374-75; *see also, e.g.*, *Hallie*, 471 U.S. at 43-44. Yet here, *contra Parker*, the Fourth Circuit's holding radically overrides a State's "sovereign" choices concerning who shall serve as its "officers" and how it shall exercise "control over" them. *See* 317 U.S. at 350-51. Specifically, the decision below leaves States that

enforce anticompetitive laws with only two options—each of which is a significant infringement on state sovereignty and which could seriously impair the effective enforcement of the state-law regimes that have long governed regulated professionals, such as dentists, doctors, lawyers, and accountants.

First, States could stop entrusting control over regulatory agencies to officers who are also market participants (or at least not market-participant officers elected by other market participants). But "[i]t is obviously essential to the independence of the States" that they retain "the power to prescribe the qualifications of its officers and the manner in which they shall be chosen." *Gregory*, 501 U.S. at 460. Moreover, the intrusion on that vital aspect of state sovereignty is particularly troubling here, where the sovereign decision being nullified is that experienced professionals should serve as, and also select, the officers of state regulatory agencies. Because the "lay public" often "is incapable of adequately evaluating" issues that require the "specialized knowledge" of professionals, *see California Dental Ass'n v. FTC*, 526 U.S. 756, 772 (1999), forcing States to regulate without their desired level of professional involvement might "diminish, if not destroy, [the] usefulness" of "[a]gencies [that] are created ... to deal with problems ... outside the competence of" the public, *see S. Motor Carriers*, 471 U.S. at 64.

Second, States could start actively supervising regulatory agencies that are controlled by market-participant members when they enforce the countless state-law regimes that authorize anticompetitive regulatory practices, such as professional licensing schemes. But "it is hard to

imagine a greater *intrusion* into the internal affairs of a state than a federal inquiry into the government's oversight of its own agencies, and it is not easy to imagine just how a state in *practice* would go about supervising its agencies." Lopatka, *supra*, at 1040-41 (emphases added). More specifically, as to "intrusion," requiring a State to actively supervise its own agencies infringes on its "absolute discretion" to resolve a "question central to state self-government"—namely, which of its "agencies ... may be entrusted" with "exercising [which] of the governmental powers of the State." *See City of Columbus v. Ours Garage & Wrecking Serv., Inc.*, 536 U.S. 424, 437 (2002). As to "practice," it largely defeats the point of having a separate agency if all of its activities must be subjected to "pointed reexamination" by a different state actor. *See Midcal*, 445 U.S. at 106. Nor would such reexamination even seem feasible where the underlying reason for selecting market participants as agency officers is their *expertise*. And in all events, "the threat of being sued for damages ... will deter [market participants] from performing this essential public service," *see Hoover*, 466 U.S. at 580 n.34, especially given that they "may not know until after their participation has occurred (and indeed until after their trial has been completed) whether the State's supervision will be 'active' enough," *see Ticor*, 504 U.S. at 640-41 (Scalia, J., concurring).

In sum, by departing from the well-established jurisprudence of *Parker* and its progeny, the decision below threatens "the dignity and essential attributes inhering in" "the sovereign status of the States" to regulate as they deem most effective. *See Alden v. Maine*, 527 U.S. 706, 714 (1999). Moreover, by

conflicting with the decisions of the Fifth and Ninth Circuits, the decision below also threatens the "fundamental principle of *equal* sovereignty[] among the States." *See Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2623 (2013).

CONCLUSION

Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 12-1172

THE NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

AMERICAN DENTAL ASSOCIATION; AMERICAN OSTEOPATHIC ASSOCIATION; AMERICAN VETERINARY MEDICAL ASSOCIATION; AMERICAN ACADEMY OF PEDIATRIC DENTISTRY; AMERICAN ACADEMY OF PERIODONTOLOGY; AMERICAN ASSOCIATION OF ORTHODONTISTS; AMERICAN ASSOCIATION OF DENTAL BOARDS; FEDERATION OF STATE MEDICAL BOARDS; AMERICAN MEDICAL ASSOCIATION; NORTH CAROLINA MEDICAL SOCIETY; SOUTH CAROLINA MEDICAL ASSOCIATION; MEDICAL SOCIETY OF VIRGINIA; WEST VIRGINIA STATE MEDICAL ASSOCIATION; NATIONAL ASSOCIATION OF BOARDS OF PHARMACY; NORTH CAROLINA BOARD OF PHARMACY; THE FEDERATION OF STATE BOARDS OF PHYSICAL THERAPY; THE

FEDERATION OF ASSOCIATIONS OF REGULATORY BOARDS; THE ASSOCIATION OF SOCIAL WORK BOARDS; THE AMERICAN ASSOCIATION OF VETERINARY STATE BOARDS; THE FEDERATION OF CHIROPRACTIC LICENSING BOARDS; THE FEDERATION OF STATE MASSAGE THERAPY BOARDS; INTERNATIONAL CONFERENCE OF FUNERAL SERVICE EXAMINING BOARDS, INCORPORATED; THE NATIONAL ASSOCIATION OF LONG TERM CARE ADMINISTRATOR BOARDS; THE NATIONAL BOARD FOR CERTIFICATION IN OCCUPATIONAL THERAPY,

Amici Supporting Petitioner,

AMERICAN ANTITRUST INSTITUTE,

Amicus Supporting Respondent.

On Petition for Review of an Order of the Federal Trade Commission. (No. 9343)

Argued: December 5, 2012 Decided: May 31, 2013

Before SHEDD, KEENAN, and WYNN, Circuit Judges.

Petition denied by published opinion. Judge Shedd wrote the opinion, in which Judge Wynn joined. Judge Keenan wrote a separate concurring opinion.

ARGUED: Noel Lee Allen, ALLEN, PINNIX & NICHOLS, P.A., Raleigh, North Carolina, for Petitioner. Imad Dean Abyad, FEDERAL TRADE COMMISSION, Washington, D.C., for Respondent. **ON BRIEF**: M. Jackson Nichols, Catherine E. Lee,

Nathan E. Standley, Brenner A. Allen, ALLEN, PINNIX & NICHOLS, P.A., Raleigh, North Carolina, for Petitioner. Richard A. Feinstein, Director, Richard B. Dagen, William L. Lanning, Willard K. Tom, General Counsel, John F. Daly, Deputy General Counsel for Litigation, FEDERAL TRADE COMMISSION, Washington, D.C., for Respondent. Jack R. Bierig, Dale E. Thomas, SIDLEY AUSTIN LLP, Chicago, Illinois, for American Dental Association, American Osteopathic Association, American Veterinary Medical Association, American Academy of Pediatric Dentistry, American Academy of Periodontology, American Association of Orthodontists, American Association of Dental Boards, and Federation of State Medical Boards, Amici Supporting Petitioner. Leonard A. Nelson, AMERICAN MEDICAL ASSOCIATION, Chicago, Illinois; Stephen W. Keene, NORTH CAROLINA MEDICAL SOCIETY, Raleigh, North Carolina; J. Mitchell Armbruster, SMITH, ANDERSON, BLOUNT, DORSETT, MITCHELL & JERNIGAN, L.L.P., Raleigh, North Carolina, for The American Medical Association and the Medical Associations for the States of North Carolina, South Carolina, Virginia, and West Virginia, Amici Supporting Petitioner. Matthew W Sawchak, Stephen D. Feldman, ELLIS & WINTERS LLP, Raleigh, North Carolina, for The National Association of Boards of Pharmacy and The North Carolina Board of Pharmacy, Amici Supporting Petitioner. Lee K. Van Voorhis, Jennifer A. Semko, Jeremy W. Cline, BAKER & MCKENZIE, LLP, Washington, D.C., for The Federation of State Boards of Physical Therapy, The Federation of Associations of Regulatory Boards, The Association of Social Work Boards, The

American Association of Veterinary State Boards, The Federation of Chiropractic Licensing Boards, The Federation of State Massage Therapy Boards, International Conference of Funeral Service Examining Boards, Incorporated, The National Association of Long Term Care Administrator Boards, and The National Board for Certification in Occupational Therapy, Amici Supporting Petitioner. Richard M. Brunell, Director of Legal Advocacy, AMERICAN ANTITRUST INSTITUTE, Washington, D.C.; Peter C. Carstensen, UNIVERSITY OF WISCONSIN LAW SCHOOL, Madison, Wisconsin; K. Craig Wildfang, Ryan W. Marth, Scott M. Kranz, ROBINS, KAPLAN, MILLER & CIRESI L.L.P., Minneapolis, Minnesota, for American Antitrust Institute, Amicus Supporting Respondent.

SHEDD, Circuit Judge:

The North Carolina State Board of Dental Examiners (the Board) petitions for review of the Federal Trade Commission (FTC) order finding that the Board violated the FTC Act, 15 U.S.C. § 45, by engaging in unfair competition in the market for teeth-whitening services in North Carolina. For the following reasons, we deny the petition.

I.

The Board is a state agency, N.C. Gen. Stat. § 90-48, created because the "practice of dentistry" in North Carolina affects "the public health, safety and welfare," N.C. Gen. Stat. § 90-22(1)(a). The eight-member Board is comprised of six licensed dentists, one licensed dental hygienist, and one consumer member. N.C. Gen. Stat. § 90-22(b). Dentists elect the six dental members, and dental hygienists elect

the hygienist member. *Id.* § 90-22 (c). If an election ends in a tie, the candidates are allowed to describe their positions on issues that will come before the Board before a revote is held. The Governor appoints the consumer member. The Board is funded by fees paid by licensed dentists and dental hygienists in North Carolina. Board members — other than the consumer member — are required to maintain an active dentistry practice while serving, and during the relevant time frame, several Board members provided teeth-whitening services.

North Carolina's Dental Practice Act provides that it is unlawful for an individual to practice dentistry in North Carolina without a license from the Board. *See* N.C. Gen. Stat. § 90-29(a). Under the Dental Practice Act, a person "shall be deemed to be practicing dentistry" if that person, *inter alia*, "[r]emoves stains, accretions or deposits from the human teeth." N.C. Gen. Stat. § 90-29(b)(2). The Board has the "power" to (1) refuse to issue a license to practice dentistry; (2) refuse to renew a license; (3) revoke or suspend a license; or (4) take other disciplinary measures "against a licensee as it deems fit and proper." N.C. Gen. Stat. § 90-41. If the Board suspects an individual of engaging in the unlicensed practice of dentistry, it may bring an action to enjoin the practice in North Carolina Superior Court or may refer the matter to the District Attorney for criminal prosecution. *See* N.C. Gen. Stat. § 90-40.1. This power is hardly unique, however, because such actions may also be maintained by the "Attorney General for the State of North Carolina, the district attorney of any of the superior courts," or "any resident citizen." *Id.* Moreover, the Board does not have the authority to discipline unlicensed

individuals or to order non-dentists to stop violating the Dental Practice Act.

This case involves the market for teeth-whitening services in North Carolina. Teeth-whitening is a popular cosmetic dental procedure that is available in North Carolina, as in most states, in several forms, including as an in-office dental treatment, as dentist-provided take-home kits, as over-the-counter products, and as services provided by non-dentists at salons, mall kiosks, and other locations. Each of these teeth-whitening services involves applying peroxide to the teeth by means of a gel or strip, which triggers a chemical reaction that results in whiter teeth. The services differ, however, in the immediacy of the results, the ease of use, the necessity of repeat applications, the need for technical support, and price. Not surprisingly, in-office dentist whitening procedures are fast, effective, and usually do not require repeated applications, but they are also the "most costly" offering. (J.A. 146). In contrast, over-the-counter whitening products typically contain lower concentrations of peroxide and may require multiple applications to achieve results, but they cost far less.

Beginning in the 1990s, dentists started providing whitening services throughout North Carolina. In about 2003, non-dentists also started offering teeth-whitening services, often at a significantly lower price than dentists. Shortly thereafter, dentists began complaining to the Board about the non-dentists' provision of these services.

Relevant here, after receiving complaints from dentists, the Board opened an investigation into teeth-whitening services performed by non-dentists.

A case officer (a dentist board member) spearheaded the investigation, leading an investigatory panel consisting of the Board's Deputy Operations Officer, an Investigator, and on occasion the Board's legal counsel. Although permitted to do so, neither the consumer member nor the hygienist member participated in any of the teeth-whitening investigations. During meetings, the Board discussed the increasing number of complaints regarding non-dentist teeth-whitening services and indicated to practicing dentists that the Board was attempting to shut down these non-dentist providers.

As a result of the investigations, the Board issued at least 47 cease-and-desist letters to 29 non-dentist teeth-whitening providers. The letters were issued on official letterhead and requested that the target cease and desist "all activity constituting the practice of dentistry." (J.A. 159). Several letters indicated that the sale or use of teeth-whitening products by a non-dentist is a misdemeanor. These letters effectively caused non-dentists to stop providing teeth-whitening services in North Carolina and also caused manufacturers and distributors of teeth-whitening products used by these non-dentist providers to exit or hold off entering North Carolina. The Board also sent letters to mall operators in an effort to stop malls from leasing kiosk space to non-dentist teeth-whitening providers; additionally, the Board contacted the North Carolina Board of Cosmetic Art Examiners to request that the Cosmetic Board inform its members and licensees to refrain from providing teeth-whitening services.

In sum, the Board successfully expelled non-dentist providers from the North Carolina teeth-

whitening market. On June 17, 2010, the Federal Trade Commission issued an administrative complaint against the Board, charging it with violating 15 U.S.C. § 45, the FTC Act, by excluding non-dentist teeth whiteners from the market. The Board moved to dismiss the complaint, arguing that the FTC lacked jurisdiction over it and, alternatively, that it was exempt from the federal antitrust laws under the "state action" doctrine. An Administrative Law Judge (ALJ) denied the motion, and the FTC affirmed. *Interlocutory Order In re North Carolina State Bd. of Dental Exam'rs*, 151 F.T.C. 607, 2011 WL 3568990 (FTC February 3, 2011) (*Interlocutory Order*). In response, the Board filed a federal declaratory action, raising the same grounds and requesting that a federal court stop the administrative proceeding against it. The district court dismissed that action as an improper attempt to enjoin ongoing administrative procedure.[1] *North Carolina State Bd. of Dental Examiners v. FTC*, 768 F Supp. 2d 818 (E.D.N.C. 2011).

The ALJ then held a merits trial and issued an opinion finding that the Board violated the FTC Act. On appeal, the FTC – applying a de novo standard of review – affirmed and entered a final order against the Board that included a cease-and-desist order enjoining the Board from, *inter alia*, continuing to unilaterally issue extra-judicial orders to teeth-whitening providers in North Carolina. *In re North Carolina State Bd. of Dental Exam'rs*, 2011-2 Trade

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[1] The Board has appealed that decision. *See North Carolina State Bd. of Dental Exam'rs v. FTC*, No. 11-1679. In light of our opinion in this petition for review, we have dismissed that appeal as moot.

Cases P 77705, 2011 WL 6229615, at *2-5 (FTC December 7, 2011) (*Final Order*).

The Board petitions for review of the FTC's final order, raising three arguments: that it is exempt from the antitrust laws under the state action doctrine; that it did not engage in concerted action under § 1 of the Sherman Act; and that its activities did not unreasonably restrain trade under § 1. We address each in turn.

II.

A.

We begin with the Board's contention that it is exempt from the antitrust laws under the "state action" doctrine.[2] Under this doctrine, the antitrust laws do "not apply to anticompetitive restraints imposed by the States 'as an act of government.'" *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 370 (1991) (quoting *Parker v. Brown*, 317 U.S. 341, 352 (1943)). In *Parker*, the Supreme Court announced this doctrine after recognizing that "nothing in the language of the Sherman Act or in its history suggests that its purpose was to restrain a

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[2] The Board also argues that the FTC lacked jurisdiction over it because it is not a "person" under the FTC Act, 15 U.S.C. § 45 (a)(2). We find this argument to be without merit. The Supreme Court has held that a state is a "person" under the Sherman Act and the Clayton Act. *Jefferson Cnty. Pharm. Ass'n v. Abbott Labs.*, 460 U.S. 150, 155 (1983) (Clayton Act); *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 395 (1978) (Sherman Act). In *Jefferson County*, the Court noted it did not "perceive any reason to construe the word 'person' in [the Sherman] Act any differently than we have in the Clayton Act." *Jefferson Cnty.*, 460 U.S. at 156. Given the similarities between the FTC Act and the Clayton and Sherman Acts, we likewise find that the Board is a "person" under the FTC Act.

state or its officers or agents from activities directed by its legislature." 317 U.S. at 350-51. The *Parker* Court cautioned, however, that a state cannot "give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." 317 U.S. at 351.

There are "three situations in which a party may invoke the *Parker* doctrine." *South Carolina State Bd. of Dentistry v. FTC*, 455 F.3d 436, 442 (4th Cir. 2006). First, a state's own actions "ipso facto are exempt" from the antitrust laws.[3] *Hoover v. Ronwin*, 466 U.S. 558, 568 (1984). Second, private parties can claim the *Parker* exemption if acting pursuant to a "clearly articulated and affirmatively expressed as state policy" *and* their behavior is "actively supervised by the State itself." *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (internal quotation marks omitted). Third, as the Supreme Court recently reaffirmed, municipalities and "substate governmental entities do receive immunity from antitrust scrutiny when they act pursuant to state policy to displace competition with regulation or monopoly public service." *FTC v. Phoebe Putney*

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[3] The Board repeatedly asserted at oral argument that it is "sovereign" within the meaning of *Parker*. The Supreme Court has recognized two entities as "sovereign" under *Parker* — the state legislature and the state supreme court when "acting legislatively." *Hoover v. Ronwin*, 466 U.S. 558, 567-68 (1984) (citing *Parker*, 317 U.S. at 351 (legislature); and *Bates v. State Bar of Arizona*, 433 U.S. 350, 360 (1977) (state supreme court)). The actions of these entities are "ipso facto" exempt from the antitrust laws. *Id.* at 568. It is obvious that a state agency comprised of privately employed dentists is not the "sovereign" equivalent of the state legislature or state supreme court.

Health Sys., Inc., 133 S. Ct. 1003, 1010 (2013) (internal quotation marks omitted). Municipalities are not required to show the active-supervision prong of the *Midcal* test, because, "[w]here the actor is a municipality, there is little or no danger that it is involved in a *private* price-fixing arrangement." *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 47 (1985) (emphasis in original).[4] The Court's rationale stemmed from the fact that a municipality's conduct

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[4] The *Hallie* Court also included the following footnote addressing state agencies:

> In cases in which the actor is a state agency, it is likely that active state supervision would also not be required, although we do not here decide that issue. Where state or municipal regulation by a private party is involved, however, active state supervision must be shown, even where a clearly articulated state policy exists.

Town of Hallie v. City of Eau Claire, 471 U.S. 34, 46 n.10 (1985). Relying on this footnote, the Board maintains that, because it is categorized as a state agency by North Carolina, it, too, is not required to show active supervision. This footnote, however, does not bear quite the weight the Board suggests. First, in *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 57 (1985), issued the same day as *Hallie*, the Court stated that *Midcal* continued to define "most specifically" the situations in which "state agencies" were entitled to the *Parker* exemption. Second, as the FTC explained in rejecting the Board's argument, "the dicta in footnote 10 of *Hallie* must be reconciled with the Court's other language and reasoning in that same decision," including its discussion of *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), which we discuss *infra* at 15-16. *Interlocutory Order*, 151 F.T.C. at 625. Although we find the dicta in *Hallie* inapplicable in the instant case, where the "state agency" is composed entirely of private market participants, our opinion should not be read as precluding more quintessential state agencies from arguing that they need not satisfy the active supervision requirement.

is "likely to be exposed to public scrutiny" and "checked to some degree through the electoral process." *Id.* at 45 n.9. Thus, "at the end of the day a municipality shares the state's 'immunity' when but only when it is implementing anticompetitive policies authorized by the state." *Kay Elec. Coop, v. City of Newkirk*, 647 F.3d 1039, 1042 (10th Cir. 2011).

While *Parker* is available in these three circumstances, in *Phoebe Putney* the Court cautioned that "given the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws, 'state-action immunity is disfavored, much as are repeals by implication.'" *Phoebe Putney*, 133 S. Ct. at 1010 (quoting *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992)). Thus, "we recognize state-action immunity only when it is clear that the challenged anticompetitive conduct is undertaken pursuant to a regulatory scheme that 'is the State's own.'" *Id.* (quoting *Ticor*, 504 U.S. at 635).

B.

In this case, the FTC first held that the Board was a private party required to meet both prongs of *Midcal* and then concluded that the Board could not show it was actively supervised by North Carolina. The FTC rejected the Board's argument that, as a state agency, it was a substate governmental entity that only had to show its actions were authorized by a clearly articulated state policy. While recognizing that state agencies may, in some instances, fall within *Hallie*, the FTC found that the "Court has been explicit in applying the antitrust laws to public/private hybrid entities, such as regulatory bodies consisting of market participants" like the

Board. *Interlocutory Order*, 151 F.T.C. at 619. The FTC explained that the "operative factor is a tribunal's degree of confidence that the entity's decision-making process is sufficiently independent from the interests of those being regulated," and that, because a decisive majority of the Board was elected by dentists, it was required to meet the active-supervision requirement. *Id.* The FTC found this conclusion was supported by the policies underlying the state action doctrine:

> Decisions that are made by private parties who participate in the market that they regulate are not subject to these political constraints unless these decisions are reviewed by disinterested state actors to assure fealty to state policy. Without such review, "there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests." *Patrick v. Burget*, 486 U.S. 94, 101 (1988). Therefore, allowing the antitrust laws to apply to the unsupervised decisions of self-interested regulators acts as a check to prevent conduct that is not in the public interest.

Id. at 622.

Having reached this conclusion, the FTC then easily determined that the Board was not actively supervised because it pointed only to "generic oversight" that did "not substitute for the required review and approval of the 'particular anticompetitive acts' that the complaint challenges." *Id.* at 630 (quoting *Patrick*, 486 U.S. at 101).

C.

In its petition for review, the Board renews its contention that, as a state agency, it is only required to show clear articulation. Alternatively, the Board contests the FTC's conclusion that its conduct was not actively supervised. We disagree with the Board on both counts.

First, we agree with the FTC that state agencies "in which a decisive coalition (usually a majority) is made up of participants in the regulated market," who are chosen by and accountable to their fellow market participants, are private actors and must meet both *Midcal* prongs. Phillip E. Areeda & Herbert Hovenkamp, 1A Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶ 227b, at 501 (3d ed. 2009). *See also* Einer Richard Elhauge, *The Scope of Antitrust Process*, 104 Harv. L. Rev. 667, 689 (1991) (concluding that "financially interested action is 'private action' subject to antitrust review"). This result accords with Supreme Court precedent as well as our own.

For example, in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), the Court addressed an ethical opinion enforced by the Virginia State Bar Association that required attorneys to abide by a minimum fee schedule. The Bar was a "state agency by law," *id.* at 790, with the "power to issue ethical opinions," *id.* at 791. The Court still denied the *Parker* exemption to the Bar, concluding that:

> The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members. *Cf. Gibson v. Berryhill*, 411 U.S.

> 564, 578-579 (1973). The State Bar, by providing that deviation from County Bar minimum fees may lead to disciplinary action, has voluntarily joined in what is essentially a private anticompetitive activity, and in that posture cannot claim it is beyond the reach of the Sherman Act.

Id. at 791-92.

The key, according to the *Goldfarb* Court, was that the *Parker* exemption did not permit the state agency to "foster anticompetitive practices for the benefit of its members." When a state agency and its members have the attributes of a public body — such as a municipality — and are subject to public scrutiny such that "there is little or no danger that [they are] involved in a private price-fixing arrangement," active supervision is not required. *Hallie*, 471 U.S. at 47. However, when a state agency appears to have the attributes of a private actor and is taking actions to benefit its own membership — as in *Goldfarb* — both parts of *Midcal* must be satisfied. Requiring active supervision over such entities ensures "the State has exercised sufficient independent judgment and control so that the details of the [challenged action] have been established as a product of deliberate state intervention." *Ticor*, 504 U.S. at 634.

We have indicated — prior to *Midcal* and *Hallie* — that a state agency operated by market participants must show active state involvement. *See Asheville Tobacco Bd. of Trade, Inc. v. FTC*, 263 F.2d 502, 509 (4th Cir. 1959). In *Asheville Tobacco*, we addressed conduct by a local board of trade comprised of market participants. The board was "an

administrative agency of the State of North Carolina," *id.* at 508, that was granted the authority under state law to "make reasonable rules and regulations" for selling "leaf tobacco at auction," *id.* at 505. We found that the board was required to show that it was adequately supervised by the state because, in function, the board was a private actor "organized primarily for the benefit of those engaged in the business." *Id.* at 509.[5] Of particular relevance was the fact that the officers were appointed from the board's membership and not by the State – a factor also present in this case. *Id.* at 510. *See also Washington State Elec. Contractors Ass'n, Inc. v. Forrest*, 930 F.2d 736, 737 (9th Cir. 1991) (noting state regulatory council "may not" qualify as "state agency" because it "has both public and private members, and the private members have their own agenda"); *FTC v. Monahan*, 832 F.2d 688, 689-90 (1st Cir. 1987) (Breyer, J.) (noting state pharmacy board's status as public or private "depends upon how the Board functions in practice, and perhaps upon the role played by its members who are private pharmacists").[6]

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[5] In reaching this conclusion, we specifically found that we were "not bound by the State court's characterization of the boards." *Asheville Tobacco*, 263 F.2d at 509.

[6] Although the Board points to several cases concluding that a state agency did not have to demonstrate active supervision, these cases do not create the bright-line rule that the Board requests. *See Earles v. State Bd. of Certified Public Accountants of Louisiana*, 139 F.3d 1033, 1041 (5th Cir. 1998); *Bankers Ins. Co. v. Florida Residential Prop. & Cas. Joint Underwriting Ass'n*, 137 F.3d 1293, 1296-97 (11th Cir. 1998); *Hass v. Oregon State Bar*, 883 F.2d 1453, 1460 (9th Cir. 1989); *Gambrel v. Kentucky Bd. of Dentistry*, 689 F.2d 612, 620-21

In sum, we agree with the FTC that, as here, when a state agency is operated by market participants who are elected by other market participants, it is a "private" actor. Accordingly, it is required to satisfy both *Midcal* prongs to obtain the *Parker* exemption.

D.

Second, having concluded that the Board must satisfy both *Midcal* prongs, we likewise agree with the FTC that the Board cannot satisfy *Midcal*'s active-supervision prong. In *Midcal*, the Court found that California did not actively supervise the wine-selling scheme at issue because California law: (1) "simply authorizes price setting and enforces the prices established by private parties"; (2) "neither establishes prices nor reviews the reasonableness of the price schedules"; (3) does not "regulate the terms of fair trade contracts"; (4) and does not "monitor market conditions or engage in any 'pointed reexamination' of the program." *Midcal*, 445 U.S. at 105-06. The Court reinforced that our national policy in favor of robust competition "cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." *Id.* at 106. As the Court later noted, "[t]he mere presence of some state involvement or

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(6th Cir. 1982). Instead, in each case, those courts merely determined that the particular state agency at issue was more akin to a municipality than a private actor. *See, e.g., Earles*, 139 F.3d at 1041 (noting the "Board is functionally similar to a municipality"); *Hass*, 883 F.2d at 1460 (review of state provisions left "no doubt that the Bar is a public body, akin to a municipality for purposes of the state action exemption").

monitoring does not suffice." *Patrick*, 486 U.S. at 101.

North Carolina has done far less "supervision" in this case than the Court found wanting in *Midcal*. Here, the cease-and-desist letters were sent without state oversight and without the required judicial authorization. The Board has pointed to certain reporting provisions and "good government" provisions in North Carolina law, but those fall far short of the type of supervision in *Midcal* that was nonetheless considered deficient. As the FTC explained, "[t]his sort of generic oversight, however, does not substitute for the required review and approval of the 'particular anticompetitive acts'" challenged by the FTC. *Interlocutory Order*, 151 F.T.C. at 630 (quoting *Patrick*, 486 U.S. at 101).

III.

We next turn to the question of whether the FTC properly found that the Board's behavior violated the FTC Act. The FTC's factual findings are conclusive if supported by substantial evidence, *Telebrands Corp. v. FTC*, 457 F.3d 354, 358 (4th Cir. 2006), and, while we review legal issues de novo, we "give some deference to the Commission's informed judgment that a particular commercial practice is to be condemned as 'unfair,'" *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 454 (1986). "The [FTC Act] forbids a court to 'make its own appraisal of the testimony, picking and choosing for itself among uncertain and conflicting inferences.'" *Id* (quoting *FTC v. Algoma Lumber Co.*, 291 U.S. 67, 73 (1934)).

The FTC Act makes unlawful "[u]nfair methods of competition." 15 U.S.C. § 45(a)(l). In this case, the FTC determined that the Board's conduct violated

§ 45(a)(1) because it was a violation of § 1 of the Sherman Act, which we have previously recognized is a "species" of "unfair competition." *South Carolina Bd. of Dentistry*, 455 F.3d at 443 n.7. Accordingly, because the FTC limited its review to whether the Board's conduct violated § 1, we do the same. Section 1 of the Sherman Antitrust Act prohibits "[e]very contract, combination ., or conspiracy, in restraint of trade." 15 U.S.C. § 1. To establish a § 1 antitrust violation, a plaintiff must prove "(1) a contract, combination, or conspiracy; (2) that imposed an unreasonable restraint of trade." *Dickson v. Microsoft Corp.*, 309 F.3d 193, 202 (4th Cir. 2002). Here, the Board challenges both of these requirements, arguing that, under the intracorporate immunity doctrine, *see Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984), it is incapable of conspiring with itself, and that, to the extent that doctrine does not apply, the FTC failed to prove a combination or conspiracy that imposed an unreasonable restraint of trade.

A.

Section 1 of the Sherman Act applies "only to concerted action," *American Needle, Inc. v. National Football League*, 130 S. Ct. 2201, 2208 (2010), and "unilateral conduct is excluded from its purview," *Oksanen v. Page Memorial Hosp.*, 945 F.2d 696, 702 (4th Cir. 1991). In *American Needle*, the Court recognized that "[a]greements made within a firm can constitute concerted action when the parties to the agreement act on interests separate from those of the firm itself" such that "the intrafirm agreements may simply be a formalistic shell for ongoing concerted action." *American Needle*, 130 S. Ct. at

2215. *See also Am. Chiropractic Ass'n v. Trigon Healthcare, Inc.*, 367 F.3d 212, 224 (4th Cir. 2004) (recognizing "independent personal stake exception" to *Copperweld*). As the *American Needle* Court explained, "substance," not "form" determines whether an "entity is capable of conspiring under § 1," and the key inquiry is "whether there is a conspiracy between 'separate economic actors pursuing separate economic interests, such that the agreement deprives the marketplace of independent centers of decision making.'" *Robertson v. Sea Pines Real Estate Co.*, 679 F.3d 278, 285 (4th Cir. 2012) (quoting *American Needle*, 130 S.Ct. at 2212).

Applying *American Needle*, the FTC concluded that "Board members were capable of conspiring because they are actual or potential competitors." *Final Order*, 2011 WL 6229615, at *20. Specifically, the FTC found that "Board members continued to operate separate dental practices while serving on the Board," and that the "Board members had a personal financial interest in excluding non-dentist teeth whitening services" because many of them offered teeth-whitening services as part of their practices. *Id.* The FTC continued by noting its conclusion was "buttressed by the significant degree of control exercised by dentist members of the Board with respect to the challenged restraints." *Id.* at *21.

We uphold the FTC's finding that the Board has the capacity to conspire under § 1. As *American Needle* made clear, concerted action is satisfied when an agreement exists between "separate economic actors" such that any agreement "deprives the marketplace of independent centers of decision making." *American Needle*, 130 S. Ct. at 2212

(internal quotation marks omitted). The Board members — apart from the consumer member — are active dentists who are required, by the Dental Practice Act, N.C. Gen. Stat § 90-22(b) , to be actively engaged in dentistry during their Board tenure. As even the Board's own expert recognized,[7] the Board members' active-service requirement can create a conflict of interest since they serve on the Board while they remain "separate economic actors" with a separate financial interest in the practice of teeth whitening. *Cf. Oksanen*, 945 F.2d at 706 (noting "a medical staff can be comprised of physicians with independent and at times competing economic interests" and thus "have the capacity to conspire as a matter of law").[8] Any agreement between the Board members thus deprives the market of an independent center of decision making.

Moreover, the Board's status as a single entity is not dispositive because "[c]ompetitors 'cannot simply get around' antitrust liability by acting 'through a third-party intermediary or joint venture.'" *American Needle*, 130 S. Ct. at 2215-16 (quoting *Major League*

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[7] The Board's expert testified that the Board is concerned about the financial interests of dentists, and that there "is a financial aspect" to the decision to exclude the non-dentist teeth whiteners. (J.A. 580).

[8] The fact that the Board members may have a unity of purpose in the particular restraint at issue — expelling non-dentist teeth whiteners from the market — does not render them incapable of conspiring under § 1, because some "commonality of interest exists in every cartel." *Los Angeles Memorial Coliseum Comm'n v. NFL*, 726 F.2d 1381, 1389 (9th Cir. 1984). The salient fact is that the Board members, in their private business, remain "separately controlled, potential competitors." *American Needle*, 130 S. Ct. at 2215.

Baseball Properties, Inc. v. Salvino, Inc., 542 F.3d 290, 336 (2d Cir. 2008) (Sotomayor, J., concurring in judgment)). In *Robertson*, we rejected the argument that the MLS listing service's status as a "single corporation" rendered it incapable of § 1 conspiracy because it was "comprised of individual real estate brokerages that are separately incorporated and that compete with each other in the sale and purchase of real estate." *Robertson*, 679 F.3d at 285. Importantly, we found implausible the MLS's contention that the realtors could not violate § 1 because the "individual brokerages acted only in their capacities as MLS board members." *Id.* at 284. Likewise, in this case the Board's members are separate economic actors who cannot escape liability under § 1 simply by organizing under a "single umbrella." *American Needle*, 130 S. Ct. at 2212.

B.

Having determined that the Board is capable of conspiring under § 1, we next examine whether the FTC's conclusion that the Board engaged in concerted action is supported by substantial evidence. Of course, concluding that the Board has the capacity to conspire "does not mean, however, that every action taken" by the Board "satisfies the contract, combination, or conspiracy requirement of section one." *Oksanen*, 945 F.2d at 706. Thus, to be concerted action, the parties must have "a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 768 (1984). We have indicated there must be "something more" than independent action, such as "a unity of purpose or a common design and understanding, or a meeting of

the minds." *Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc.*, 878 F.2d 801, 805-06 (4th Cir. 1989). Concerted action may be proven by "direct or circumstantial evidence." *Monsanto*, 465 U.S. at 768.

The FTC found both direct and circumstantial evidence to support a finding of concerted action. First, the FTC concluded that "[o]n several occasions, the Board discussed teeth whitening services provided by non-dentists and then voted to take action to restrict these services." *Final Order*, 2011 WL 6229615, at *23. Second, the FTC found a "wealth" of circumstantial evidence to the same effect – members "engaged in a consistent practice of discouraging non-dentist teeth whitening services" through their cease-and-desist letters and other efforts. *Id.* The FTC found these communications were "similar" and had the "common objective" of closing the market. *Id.* It was this "consistency" and "frequency" that pointed to concerted action. *Id.* Substantial evidence supports this conclusion. As the FTC found, several of these letters were sent after votes by the Board, and the lengthy consistent campaign of sending letters and cease-and-desist orders is suggestive of coordinated action.[9] Accordingly, we agree with the FTC that the Board engaged in a combination or conspiracy under § 1.

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[9] The Board renews its argument -- made with regard to the state action doctrine — that enforcement of state law can never be an antitrust conspiracy. As previously discussed, the Board was acting to regulate third parties in a manner not authorized by state law.

IV.

Finally, the Board challenges the FTC's conclusion that its actions amounted to an unreasonable restraint of trade under § 1. As noted above, we review the FTC's legal conclusion de novo — while giving some deference to its expertise — and we uphold its factual findings if supported by substantial evidence. *Indiana Fed'n of Dentists*, 476 U.S. at 454. We have recognized three forms of analysis for determining if conduct violates § 1: (1) per se; (2) quick-look; and (3) rule of reason. *Continental Airlines, Inc. v. United Airlines, Inc.*, 277 F.3d 499, 508-09 (4th Cir. 2002).[10] "The boundaries between these levels of analysis are fluid," and they are "best viewed as a continuum." *Id.* at 509. "In all cases, however, 'the criterion to be used in judging the validity of a restraint on trade is its impact on competition.'" *Id.* (quoting *National Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 104 (1984)).

The rule of reason applies "if the reasonableness of a restraint cannot be determined without a thorough analysis of its net effects on competition in the relevant market." *Id.* In some instances, an examination short of the rule of reason can be substituted, that is, when a "quick look" indicates the

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[10] The per se analysis, which "permits courts to make 'categorical judgments' that certain practices, including price fixing, horizontal output restraints, and market-allocation agreements," are per se violative of § 1, is not at issue in this case because the FTC utilized the "quick look" and full rule of reason analysis. *Continental Airlines*, 277 F.3d at 509 (quoting *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 289 (1985)).

anticompetitive effect of the conduct "but procompetitive justifications also exist." *Id.* "Rather than focusing upon the category to which a particular restraint should be assigned," *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 35 (D.C. Cir. 2005), the "'essential inquiry remains the same – whether or not the challenged restraint enhances competition,'" *California Dental Ass'n. v. FTC*, 526 U.S. 756, 780 (1999) (quoting *Bd. of Regents of University of Oklahoma*, 468 U.S. at 104). Application of a quick look is appropriate when "the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least a quicker) look, in place of a more sedulous one." *Id.* at 781. In applying this abbreviated analysis, however, a court "must carefully consider a challenged restriction's possible procompetitive justifications." *Continental Airlines*, 277 F.3d at 510.

In this case, the FTC determined that the Board's conduct violated § 1 under both a quick-look analysis[11] and a full rule of reason. *Final Order*, 2011 WL 6229615, at *18 (noting the FTC analyzed the Board's behavior under "the modes of analysis endorsed in *Indiana Federation of Dentists*," including the quick look approach and the rule of reason). Applying the quick look approach, the FTC first concluded that the conduct was "inherently suspect" because "[t]he challenged conduct is, at its core, concerted action excluding a lower-cost and

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[11] The FTC referred to the quick look analysis as the "inherently suspect" approach, consistent with its earlier ruling in *In re Polygram Holding, Inc.*, 136 F.T.C. 310 (2003), *aff'd Polygram Holding, Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2005).

popular group of competitors," *id.* at *25, and "[n]o advanced degree in economics is needed to recognize" that the behavior "is likely to harm competition and consumers, absent a compelling justification," *id.* at *26.

We affirm the FTC's mode of analysis and find that its conclusion that the Board's behavior was likely to cause significant anticompetitive harms is supported by substantial evidence. *See Fashion Originators' Guild of Am., Inc. v. FTC*, 312 U.S. 457, 465 (1941) (holding that manufacturer's boycott of certain retailers "has both as its necessary tendency and as its purpose and effect the direct suppression of competition"); *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 294 (1985) (internal quotation marks omitted) (noting "likelihood of anticompetitive effects is clear" in group boycotts involving "joint efforts to disadvantage competitors by either directly denying or persuading or coercing suppliers or customers to deny relations the competitors need in the competitive struggle"). The Court has made clear that practices like group boycotts are amenable to the quick look approach – cases in which "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." *California Dental*, 526 U.S. at 770. It is not difficult to understand that forcing low-cost teeth-whitening providers from the market has a tendency to increase a consumer's price for that service.[12]

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[12] The Board argues that FTC failed to consider its justification, that it "acted pursuant to state law," and was "motivated by

Of note here, the Supreme Court has cautioned that we should be hesitant to quickly condemn the actions of professional organizations because "certain practices by members of a learned profession might survive scrutiny even though they would be viewed as a violation of the Sherman Act in another context." *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 686 (1978). *See also Goldfarb*, 421 U.S. at 788 n.17 ("The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act."). That is, "[t]he public service aspect" of a profession "may require that a particular practice be treated differently." *Goldfarb*, 421 U.S. at 788 n.17.

The Supreme Court has likewise made pellucid, however, that anticompetitive acts are not immune from § 1 because they are performed by a professional organization. *See, e.g., Arizona v. Maricopa Cnty. Med. Soc'y*, 457 U.S. 332, 347-51 (1982) (condemning as a per se § 1 violation maximum fee setting agreement by physicians); *Indiana Fed'n of Dentists*,

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public protection concerns." (Appellant's Br. at 57). The FTC found that, even assuming these were appropriate justifications for anticompetitive behavior, the Board failed to adduce factual support. The FTC recounted that the Board members pointed to "theoretical" risks of teeth-whitening services without "any clinical or empirical evidence validating" the risks and that the Board could only point to four anecdotal cases of consumer injury "over a multi-year period based on products considered safe by the FDA and used over a million times over the last twenty years." *Final Order*, 2011 WL 6229615, at *33. The FTC likewise noted the "lack of contemporaneous evidence that the challenged conduct was motivated by health or safety concerns." *Id.* We find this conclusion supported by substantial evidence.

476 U.S. at 459-60 (finding horizontal agreement among dentists to be a § 1 violation under quick look analysis). We have also noted, "we are not inclined to condone anticompetitive conduct upon an incantation of 'good medical practice.'" *Virginia Acad. of Clinical Psychologists v. Blue Shield of Virginia*, 624 F.2d 476, 485 (4th Cir. 1980). In this case, the Board's status as a group of professionals does not condone its anticompetitive practices. Accordingly, we conclude that substantial evidence supports the FTC's factual findings regarding the economic effects of the Board's actions and that those findings support the conclusion that the Board's behavior violates § 1. *Indiana Fed'n of Dentists*, 476 U.S. at 465-66.

V

In conclusion, we note that our decision today hardly sounds the death knell for federal/state balance the Board posits. For one, given our conclusion that the Board is a private actor under the antitrust laws, there is no federalism issue. To that end, we note that Board is represented by private counsel and the State has never intervened in the proceedings on the Board's behalf. *Cf. Maryland Stadium Auth. v. Ellerbe Beckett, Inc.*, 407 F.3d 255, 264-65 (4th Cir. 2005) (noting representation by state Attorney General was factor in determining state control). At the end of the day, this case is about a state board run by private actors in the marketplace taking action outside of the procedures mandated by state law to expel a competitor from the market. Despite these actions, if the Board was actively supervised by the State, it would be entitled to the *Parker* exemption. Today's opinion simply reinforces the Court's admonition that federalism "serves to

assign political responsibility, not to obscure it." *Ticor*, 504 U.S. at 636. As the FTC summarized:

> allowing the antitrust laws to apply to the unsupervised decisions of self-interested regulators acts as a check to prevent conduct that is not in the public interest; absent antitrust to police their actions, unsupervised self-interested boards would be subject to neither political nor market discipline to serve consumers' best interests.

Interlocutory Order, 151 F.T.C. at 622-23.

For the foregoing reasons, the Board's petition for review is denied.

PETITION DENIED

BARBARA MILANO KEENAN, Circuit Judge, concurring:

I am pleased to concur in the majority's opinion. I write separately to emphasize the narrow scope of our holding that the North Carolina State Board of Dental Examiners (the Board) is a private actor for purposes of the state action doctrine, and to discuss the practical implications of our decision.

Under the Supreme Court's precedent, private parties are immune from the antitrust laws under the state action doctrine when two criteria are met. *See Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (*Midcal*). First, the challenged restraint must be "clearly articulated and affirmatively expressed as state policy," and, second, that policy must be "actively supervised" by the state itself. *Id.*

In this context, it is useful to state what our opinion does *not* hold. We do not hold that a state

agency must always satisfy the active supervision prong of the standard set forth in *Midcal* to qualify for antitrust immunity under the state action doctrine. Nor do we hold that a state agency comprised, in whole or in part, of members participating in the market regulated by that state agency is a private actor subject to *Midcal*'s active supervision prong. Instead, our holding that the Board is a private actor for purposes of the state action doctrine turns on the fact that the members of the Board, who are market participants, are elected by other private participants in the market. *See* slip op. at 18 ("[W]hen a state agency is operated by market participants who are elected by other market participants, it is a 'private' actor.").

If the Board members here had been appointed or elected by state government officials pursuant to state statute, a much stronger case would have existed to remove the Board from the reach of *Midcal*'s active supervision prong.* *See FTC v.*

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* The separate features supporting the Board's position included: (1) the North Carolina legislature's designation of the Board "as the agency of the State for the regulation of the practice of dentistry in this State," N.C.G.S. § 90-22(b); (2) the designation of Board members as "State employees," N.C.G.S. § 93B-16(b); (3) the Board members' entitlement to sovereign immunity and legal defense by the state attorney general, N.C.G.S. §§ 93B-16(c), 143-300.3; (4) the oath Board members are required to take promising to uphold North Carolina's laws and protect the health, safety, and welfare of the public, N.C. CONST. art. VI, § 7; (5) the potential that Board members may be punished by the North Carolina Ethics Commission if the members act in a manner that presents a conflict of interest, N.C.G.S. §§ 138A-10, 12 (o); and (6) the review powers over the Board enjoyed by the North Carolina Joint Legislative Commission on Governmental Operations, which has the power

Phoebe Putney Health System, Inc., 133 S. Ct. 1003, 1010 (2013) (holding that municipal and certain "substate" entities of government receive immunity from antitrust scrutiny when they act pursuant to clearly articulated and affirmatively expressed state policy to displace competition, without regard to whether their activities are actively supervised by the state).

I further observe that subjecting the Board to *Midcal*'s active supervision prong does not impose an onerous burden on either the Board or the state. The Supreme Court explained that "the requirement of active state supervision serves essentially an *evidentiary function*: it is one way of ensuring that the actor is engaging in the challenged conduct pursuant to state policy." *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46 (1985) (emphasis added). Accordingly, if a state creates an agency and directs that the members of that agency be selected in a manner similar to the process employed here, the agency may still enjoy antitrust immunity if, for example, the state "monitor[s] market conditions or engage[s] in [a] 'pointed reexamination'" of the agency's actions, *Midcal*, 445 U.S. at 106, or if the agency's actions have been authorized by the state's judiciary or are subject to judicial enforcement proceedings, *Bates v. State Bar of Arizona*, 433 U.S. 350, 361-62 (1977).

In this case, I do not doubt that the Board was motivated substantially by a desire to eliminate an unsafe medical practice, namely, the performance of

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to study state agency activities regarding "conformity with legislative intent," N.C.G.S. § 120-76(1)(d).

teeth whitening services by unqualified individuals under unsanitary conditions. The Board was aware that several consumers had suffered from adverse side effects, including bleeding or "chemically burned" gums, after receiving teeth-whitening services from persons not licensed to practice dentistry. Additionally, the Board was aware that many of the "mall kiosks" where such teeth-whitening services are performed lack access to running water. The Board also received reports that non-licensed persons performed teeth-whitening services without using gloves or masks, thereby increasing the risk of adverse side effects. Accordingly, in my view, the record supports the Board's argument that there is a safety risk inherent in allowing certain individuals who are not licensed dentists, particularly mall-kiosk employees, to perform teeth-whitening services.

North Carolina is entitled to make the legislative judgment that the benefits of prohibiting non-dentists from performing dental services related to stain removal outweigh the harm to competition that results from excluding non-dentists from that market. That kind of legislative judgment exemplifies the very basis of the state action immunity doctrine. However, because "state-action immunity is disfavored," *Phoebe Putney*, 133 S. Ct. at 1010, when the state makes such a judgment, the state must act as the state itself rather than through private actors only loosely affiliated with the state.

Here, the fact that the Board is comprised of private dentists elected by other private dentists, along with North Carolina's lack of active supervision of the Board's activities, leaves us with little

confidence that the state itself, rather than a private consortium of dentists, chose to regulate dental health in this manner at the expense of robust competition for teeth whitening services. Accordingly, the Board's actions are those of a private actor and are not immune from the antitrust laws under the state action doctrine. With these observations, I am pleased to join the majority opinion.

APPENDIX B

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Jon Leibowitz, Chairman
William E. Kovacic
J. Thomas Rosch
Edith Ramirez
Julie Brill

In the Matter of	Docket No. 9343 [Nonpublic Version]
THE NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS	

OPINION OF THE COMMISSION

By KOVACIC, Commissioner, for a Unanimous Commission:[1]

I. INTRODUCTION

This case presents us with an opportunity to decide whether the principles of federalism embodied in the state action doctrine shield respondent, the North Carolina State Board of Dental Examiners (the Board), from antitrust challenge to its pattern of conduct alleged to have impaired competition in the market for teeth whitening services.

The Supreme Court held nearly seventy years ago that Congress did not intend the federal antitrust laws to cover the acts of sovereign states. *Parker v. Brown*, 317 U.S. 341 (1943). Since then, a line of

[1] Commissioner Julie Brill has not participated in this matter.

Supreme Court cases, which has come to form the state action doctrine, has developed to exempt acts of the sovereign from antitrust scrutiny. This doctrine does not prevent a state from delegating its sovereign ability to pursue anticompetitive market regulation to non-sovereign actors, such as cities or even private actors. Because the balance between competition policy and federalism embodied in the state action doctrine exempts only sovereign policy choices from federal antitrust scrutiny, non-sovereign defendants invoking the state action defense must clear additional hurdles to ensure that their challenged conduct truly comports with a state decision to forego the benefits of competition to pursue alternative goals. These requirements vary depending on the extent to which a tribunal is concerned that decision-makers are pursuing private rather than sovereign interests. For example, municipalities can enact anticompetitive regulations as long as they can show that their actions are consonant with a clearly articulated and affirmatively expressed state policy. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 40 (1985). Private parties that engage in anticompetitive conduct, on the other hand, can avail themselves of the state action exemption only if they can show that their actions were both taken pursuant to a clearly articulated and affirmatively expressed state policy and actively supervised by the state itself. *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

In the case before us, the decisive majority of the Board, which is charged with regulating the practice of dentistry in North Carolina, earns a living by practicing dentistry. The Complaint alleges that the Board determined on its own that teeth whitening

was a practice that could be performed only under the supervision of a dentist and used the imprimatur of state authority to drive lower-priced non-dentists from the relevant market. We conclude that given the Board's obvious interest in the challenged restraint, the state must actively supervise the Board in order for the Board to claim state action protection from the antitrust laws. Because we find such supervision lacking, we further hold that the Federal Trade Commission Act reaches the Board's conduct.

II. PROCEDURAL BACKGROUND

The Commission issued an administrative complaint against the respondent Board on June 17, 2010. The complaint alleges that the Board violated Section 5 of the FTC Act by classifying teeth whitening as the practice of dentistry and by enforcing this determination through cease and desist orders that were neither authorized nor supervised by the state, and that were designed to, and did, drive non-dentist teeth whiteners from the relevant North Carolina market. The evidentiary hearing before the Administrative Law Judge is currently scheduled for February 17, 2011. Before us are the Board's motion to dismiss the entire administrative complaint on the ground that its conduct is exempted from antitrust liability by the state action doctrine, and Complaint Counsel's motion for partial summary decision on the propriety of the Board's invocation of the state action doctrine as an affirmative defense. The parties have filed memoranda in support of their motions and their respective responses, replies, and supplemental filings, the latest of which was filed on January 20,

2011.[2] Pursuant to our Rules of Practice, 16 C.F.R. § 3.24(a)(l)-(2), the parties have also filed their respective statements of material facts as to which Complaint Counsel contends there is no genuine issue for trial,[3] and as to some of which the Board contends that a genuine dispute does exist.[4] Our decision here is based on our review of those statements, including their accompanying affidavits and exhibits, as well as on matters of "official or judicial notice," such as "judicial decisions, statutes, regulations, and records and reports of administrative bodies." *S.C. State Bd. of Dentistry*, 138 F.T.C. 229, 240 (2004) (internal quotation marks and citation omitted).

Under our revised Rules of Practice, "[m]otions to dismiss filed before the evidentiary hearing and motions for summary decision shall be directly referred to the Commission and shall be ruled on by the Commission unless the Commission in its discretion refers the motion to the Administrative Law Judge." 16 C.F.R. § 3.22(a) (2011). The

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[2] The Board filed a motion for leave to file a surreply brief, along with the surreply brief, on January 20, 2011. We note that there are no provisions in the Commission Rules to file a surreply brief. Further, the Board's brief is untimely — coming a month after the last filing by Complaint Counsel — and it does not respond to any new arguments raised by Complaint Counsel's reply brief. Nonetheless, as a matter of discretion, we have considered the Board's filing.

[3] *See* Compl. Counsel's Rule 3.24 Separate Statement of Material Facts As to Which There Is No Genuine Issue (hereinafter "CCSMF").

[4] *See* Respt's Separate Statement of Material Facts As to Which There Are and Are Not Genuine Issues (hereinafter "BSMF").

Commission issued those revisions in 2009 "in order to further expedite its adjudicative proceedings, improve the quality of adjudicative decision making, and clarify the respective roles of the Administrative Law Judge ('ALJ') and the Commission in Part 3 proceedings." 73 Fed. Reg. 58,832 (Oct. 7, 2008) (Proposed Rule Amendments); *see also* 74 Fed. Reg. 1804 (January 13, 2009) (Interim Final Rules); 74 Fed. Reg. 20205 (May 1, 2009) (Amendments Adopted As Final). Thus, "an early ruling on a dispositive motion may expedite resolution of a matter and save litigants resources where the legal issue is the primary dispute." 73 Fed. Reg. at 58,836; *see also S.C. State Bd.*, 138 F.T.C. at 231. We accordingly decide the motions here *ab initio*.

In light of the close of discovery and the fact that the motion of Complaint Counsel for partial summary decision is based on the same issue underlying the Board's motion to dismiss the opposition to which the Board has fully briefed, supported by affidavits and other evidence and in the interests of clarity and efficiency, we exercise our discretion to treat the Board's motion to dismiss as a motion for summary decision on the issue of its qualification for state action exemption. *See S.C. State Bd.*, 138 F.T.C. at 242 ("[T]he Commission always has discretion to consider extra-pleading material and to convert a motion to dismiss to one for summary judgment."); *see also United States v. Purdue Pharma L.P.*, 600 F.3d 319, 326 (4th Cir. 2010) (converting a motion to dismiss into one for summary judgment where the parties provided evidence and thoroughly briefed the matter at issue); *Bosiger v. US Airways, Inc.*, 510 F.3d 442, 450 (4th Cir. 2007) ("It is well settled that district courts may convert a Rule 12(b)(6) motion to

dismiss into a Rule 56 motion for summary judgment, allowing them to assess whether genuine issues of material fact do indeed exist.").

III. APPLICABLE STANDARD OF REVIEW

We review the parties' motions pursuant to Rule 3.24 of our Rules of Practice, whose "provisions are virtually identical to the provisions of Fed. R. Civ. P. 56, governing summary judgment in the federal courts." *Polygram Holding, Inc.*, 136 F.T.C. 310, 2002 WL 31433923, at *1 (FTC Feb. 26, 2002); *see also* 16 C.F.R. § 3.24(a)(2) ("If the Commission determines that there is no genuine issue as to any material fact regarding liability or relief, it shall issue a final decision and order."). Such a motion or an opposition thereto may be supported by affidavits, depositions, answers to interrogatories, or other appropriate evidence not in dispute, but "a party opposing the motion may not rest upon the mere allegations or denials of his or her pleading; the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue of material fact for trial." 16 C.F.R. § 3.24(a)(3). Thus, "[t]he mere existence of a factual dispute will not in and of itself defeat an otherwise properly supported motion." *Polygram*, 2002 WL 31433923, at *1 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986)). Once the moving party has adequately supported its motion, the nonmoving party must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). It must instead establish "specific facts showing that there is a genuine issue for trial." *Id.* at 587 (internal

citations and quotation marks omitted); *see also* 16 C.F.R. § 3.24(a)(3). And "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita*, 475 U.S. at 587.

IV. UNDISPUTED FACTS

No facts material to the antitrust exemption questions before us are in genuine dispute. For purposes of summary judgment on the state action defense issue, we need not determine whether the Board's activities violate the relevant antitrust laws. Instead we focus only on whether the Board's conduct is exempt from antitrust scrutiny.[5]

The Board is an agency of the State of North Carolina, tasked with regulating the practice of dentistry in that state. N.C. Gen. Stat. § 90-22(a)-(b). It consists of six licensed dentists, one licensed dental hygienist, and one consumer member, who is neither a dentist nor a dental hygienist. N.C. Gen. Stat. § 90-22(b); CCSMF at 1, ¶¶ 1-2; BSMF at 6, ¶¶ 1-2. The licensed dentists of North Carolina elect dentist members to the Board for a three-year term. N.C. Gen. Stat. § 90-22(b); CCSMF at 1, ¶¶ 3-4; BSMF at 6, ¶¶ 3-4. During their tenure, Board members may continue to provide for-profit dental services,

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[5] Throughout the opinion we use the following abbreviations for the parties' filings: Board's Memorandum in Support of Motion to Dismiss (Corrected) ("Bd. Memo"); Board's Memorandum in Opposition to Complaint Counsel's Motion for Summary Judgment ("Bd. Opp."); Board's Reply Memorandum in Support of Motion to Dismiss ("Bd. Reply"); Complaint Counsel's Memorandum in Support of Motion for Summary Judgment ("CC Memo"); Complaint Counsel's Memorandum in Opposition to Respondent's Motion to Dismiss ("CC Opp.").

including teeth whitening. *See* Feingold Tr. 183:13-184:15; Holland Tr. 58:9-16; Wester Tr. 26:24-28:2; Hall Tr. 33:15-34:25; Allen Tr. 18:1-17. Each Board member must submit annual financial disclosures to the Ethics Commission, which list their assets and liabilities, state that they are engaged in the practice of dentistry, and identify the professional associations to which they belong and businesses other than their dental practices. N.C. Gen. Stat. § 138A-22(a); CCSFM at 22-23, ¶¶ 75-76; Newson Decl. at 5, ¶ 11; CX0395; CX0396. The Board must submit an annual report to the Secretary of State, the State Attorney General, and the Joint Legislative Administrative Procedure Oversight Committee (JLAPOC), which provides, *inter alia*, aggregate information on the number and disposition of investigations by type. N.C. Gen. Stat. § 93B-2; CX0085; CX0086; CX0088; CX0089; CX0091. The Board also must comply with North Carolina's Public Records Act (N.C. Gen. Stat. § 132-1 *et seq.*), Administrative Procedure Act (N.C. Gen. Stat. § 150B-1 *et seq.*), and open meetings law (N.C. Gen. Stat. §143-318.9 *et seq.*). BSMF at 53, ¶ 72. Further, the JLAPOC has the power "[t]o review the activities of the State occupational licensing boards to determine if the boards are operating in accordance with statutory requirements." N.C. Gen. Stat. § 120-70.101(3a).

The complaint's allegations concern the market for teeth whitening services in North Carolina. Compl. ¶ 7. Teeth whitening services are offered both by dentists, as an in-office procedure or a take-home kit, and by non-dentists, in salons, retail stores, and mall kiosks. CCSMF at 3-4, ¶ 16; BSMF at 10-11, ¶ 16. Dentist and non-dentist teeth whiteners differ

in terms of the strength of the solution used, the time involved, and the procedures used. *See generally* CCSMF at 4-7, ¶¶ 17-26; BSMF at 11-16, ¶¶ 17-26. The price for non-dentist teeth whitening typically is less than teeth whitening performed by dentists in their offices. CCSMF at 5,7, ¶¶ 19, 25; BSMF at 12, 15, ¶¶ 19, 25.

The complaint charges that the Board, reacting to the competitive threat by non-dentist providers, sought to exclude, and did exclude, non-dentists from the market for teeth whitening services in North Carolina. Compl. ¶¶ 13-23. The undisputed facts show that the Board on numerous occasions sent letters to non-dentist providers, alleging that those recipients were engaging in the unauthorized practice of dentistry in violation of North Carolina laws, and ordering the recipients to cease and desist from providing teeth-whitening services in North Carolina. CCSMF at 17-18, ¶¶ 55, 60; BSMF at 37, 44, ¶¶ 55, 60. The Board also has sent letters to some mall operators asserting that teeth whitening services offered at mall kiosks are illegal, and asking these mall operators to refrain from leasing space to non-dentist teeth whiteners. CCSMF at 19, ¶ 61; BSMF at 44-45, ¶ 61. The complaint does not challenge any attempts by the Board to bring civil or criminal proceedings against alleged violators of the North Carolina Dental Practice Act (N.C. Gen. Stat. § 90-22 *et seq.*).

V. DISCUSSION AND CONCLUSIONS OF LAW

A. Jurisdiction

Citing *California Dental Ass'n v. FTC*, 526 U.S. 756 (1999), the Board argues that it is not subject to the Commission's jurisdiction. *See* Bd. Memo at 17.

We disagree. *California Dental is* inapposite in this case where jurisdiction is asserted over a "person," not a "corporation." The complaint in this case, consistent with this established precedent, asserted jurisdiction because "[t]he Dental Board is a 'person' within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45." Compl. ¶ 5. Under Section 5 of the FTC Act, the FTC may exercise jurisdiction over "persons, partnerships, or corporations," with certain exceptions not relevant here. 15 U.S.C. § 45(a)(2). The jurisdictional question at issue in *California Dental* concerned the scope of the statutory definition of "corporation" and, in particular, whether an entity formally organized as a non-profit could nonetheless be subject to the Commission's jurisdiction as a "corporation" if it were "organized to carry on business for its own profit or that of its members." 526 U.S. at 765-66 (quoting 15 U.S.C. § 44). *California Dental*'s test for jurisdiction over "corporations," therefore, has no relevance to this case.

The Supreme Court has held that states and their regulatory bodies constitute "persons" under the antitrust laws. *See, e.g., Jefferson Cnty. Pharm. Ass'n v. Abbott Labs.*, 460 U.S. 150, 155 (1983); *Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 395 (1978); *Georgia v. Evans*, 316 U.S. 159, 162 (1942). Consistent with this precedent, and recognizing that the antitrust statutes should be construed together, the Commission has many times exercised jurisdiction over state boards as "persons" under the FTC Act. *See, e.g., Va. Bd. of Funeral Dirs. & Embalmers*, 138 F.T.C. 645 (2004); *S.C. State Bd.*,

138 F.T.C. 229; *Mass. Bd. of Registration in Optometry*, 110 F.T.C. 549 (1988).[6]

B. The State Action Doctrine

In our "dual system of government, the states are sovereign." *Parker*, 317 U.S. at 351. As such, with "nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature," the Supreme Court concluded that when "[t]he state itself exercises its legislative authority in making the regulation and in prescribing the conditions of its application," it is exempt from the prohibitions of the Sherman Act. *Id.* at 350-52. Thus, anticompetitive

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[6] In *Massachusetts Bd. of Registration in Optometry*, the Commission reasoned that because the Supreme Court had held local governments, as agents of the state, to be persons within the meaning of the Sherman Act and the Clayton Act, so too should they be considered persons under the FTC Act. 110 F.T.C. 549, 608-09 (1988) (citing *United States v. American Bldg. Maintenance Indus.*, 422 U.S. 271, 277-78 (1975)). The Commission also noted that its holding was consistent with Commission precedent, including *Indiana Fed'n of Dentists*, 93 F.T.C. 231 n. 1 (1979), and the Statement of Basis and Purpose for the Trade Regulation Rule on Advertising of Ophthalmic Goods and Services, 43 Fed. Reg. 23992, 24004 (1979). The Commission found its holding further supported by the legislative history of the FTC Act. *Mass. Bd.*, 110 F.T.C. at 609 n.19. The D.C. Circuit's decision in *California State Bd. of Optometry v. FTC*, 910 F.2d 976 (D.C. Cir. 1990), is not contrary to the general rule that for purposes of jurisdiction, states and their agents are "persons" under the FTC Act. That decision merely holds that the FTC is not authorized to reach the "'acts or practices'" of States acting in their sovereign capacity. *Id.* at 980 (citations omitted). Because we conclude that the Board is not acting as a sovereign, *California State Bd. of Optometry* has no bearing on this case.

regulation is allowed to withstand antitrust challenge as long as a court is satisfied that the restraint at issue is truly state action. *See Hoover v. Ronwin*, 466 U.S. 558, 574 (1984) (the litmus test of the state action exemption has always been whether the conduct at issue can be deemed to be "that of the State acting as a sovereign") (internal quotation marks and citation omitted).

When non-sovereign entities engage in conduct that otherwise would violate the antitrust laws, they too can avail themselves of state action protection as long as the sovereign has put into place sufficient safeguards to assure that non-sovereign actors are pursuing state goals rather than their own. *See id.* at 568 (when the activity at issue is carried out by someone other than the sovereign, "closer analysis is required" because "it becomes important to ensure that the anticompetitive conduct of the State's representative was contemplated by the State."). For example, in *Midcal*, the Supreme Court held that private parties can use the state action doctrine as a shield to avoid antitrust liability if they can show that the challenged restraint is (1) pursuant to a "clearly articulated and affirmatively expressed [] state policy;"and (2) "actively supervised by the State itself." 445 U.S. at 105 (internal quotation marks omitted).

Although "[a] municipality must demonstrate that it is engaging in the challenged activity pursuant to a clearly expressed state policy" before it is entitled to state action exemption from the antitrust laws, *Town of Hallie*, 471 U.S. at 40, municipalities are not subject to *Midcal*'s active supervision prong. *Id.* at 46. As the Court explained,

"the requirement of active state supervision serves essentially an evidentiary function: it is one way of ensuring that the actor is engaging in the challenged conduct pursuant to state policy." *Id.* Accordingly, municipalities should be subject to a lower evidentiary threshold, because unlike the case of a private party where "there is a real danger that he is acting to further his own interests, there is little or no danger that [a municipality] is involved in *a private* price-fixing agreement." *Id.* at 47 (emphasis in original); *see also id.* at 45 ("We may presume, absent a showing to the contrary, that the municipality acts in the public interest. A private party, on the other hand, may be presumed to be acting primarily on his or its own behalf").

The Board in this matter is not the sovereign.[7] The questions before us now are whether the Board must meet both *of Midcal*'s requirements to qualify for state action protection, and, if so, whether the Board has met them as a matter of law. We conclude that the Board must meet both prongs of the *Midcal* test and that it has failed to show sufficient state

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[7] The Supreme Court has held that the legislature and the state's highest court acting in its regulatory capacity are sovereign, but has left open the possibility that the executive may also be sovereign. *See Hoover*, 466 U.S. at 568 & n.17. It is undisputed that the Board is not an arm of the North Carolina legislature or the North Carolina Supreme Court. Moreover, as discussed below, the Board functions in a manner that makes it wholly inappropriate to treat its actions as presumptively sovereign, even if actions of the Governor or executive agencies subject to plenary gubernatorial control might be.

supervision.[8] Complaint Counsel is therefore entitled to partial summary judgment dismissing the state action doctrine as an affirmative defense.[9]

1. **The Board Must Meet Both Prongs of *Midcal***

In its motion, the Board argues that its challenged conduct is exempt from the federal antitrust laws because, as an instrumentality of the State of North Carolina, its actions are protected by the state action doctrine. *See* Bd. Memo at 7. More specifically, the Board argues that, to qualify for state action protection, its conduct need only meet, and as a matter of law does meet, the first prong of the Supreme Court's standard, enunciated in *Midcal* — that "the challenged restraint must be one clearly articulated and affirmatively expressed as state policy." 445 U.S. at 105 (internal quotation marks and citation omitted). The Board argues, moreover, that even if the second prong of that test that "the policy must be 'actively supervised' by the State itself," *id.* — applies in this case, then North Carolina's "structural legal oversight" of the Board is

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[8] For purposes of this motion, we have assumed, but not decided, that the Board has satisfied the clear articulation requirement. *Cf. Patrick v. Burget*, 486 U.S. 94, 100 (1988) ("We need not consider the clear articulation prong of the *Midcal* test because the active supervision requirement is not satisfied.") (internal quotation marks omitted).

[9] The Board makes fleeting reference to the *Noerr-Pennington* doctrine in the memorandum supporting its Motion to Dismiss. *See* Bd. Memo at 39-40 (citing *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965); *E. R.R. Presidents' Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961)). Such perfunctory recitation of authority, without development, fails to constitute a colorable basis to dismiss the complaint. Accordingly, we do not address this issue.

sufficient as a matter of law to satisfy that condition. *See* Bd. Memo at 34-37.

Complaint Counsel argues that the Board is financially interested in the exclusion of non-dentists from the market for teeth whitening services, and also is beholden to the industry it purports to regulate, by virtue of the fact that it is controlled by its dentist members, who are privately elected by North Carolina's licensed dentists. Therefore, says Complaint Counsel, the Board must meet both of *Midcal*'s prongs in order to qualify for state action exemption. *See* CC Memo at 17-29. Further, Complaint Counsel argues that the North Carolina Dental Practice Act, through which the Board was constituted and from which it derives its authority, does not authorize the Board to order non-dentist teeth whitening providers to cease and desist from providing such services, nor to communicate with prospective providers and third parties that the provision of teeth whitening services by dentists is unlawful. Rather, the Dental Act merely authorizes the Board to petition the North Carolina courts for relief relating to any allegedly unauthorized practice of dentistry. Accordingly, argues Complaint Counsel, the Board cannot satisfy either of the *Midcal* prongs, and thus does not qualify for antitrust exemption. *See* CC Memo at 29-34.

Midcal's active supervision requirement serves to ensure that "the State has exercised sufficient independent judgment and control so that the details of the [challenged restraint on competition] have been established as a product of deliberate state intervention." *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 634 (1992); *see also Burget*, 486 U.S. at 100

(noting that the active supervision requirement "stems from the recognition that 'where a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State.'") (quoting *Hallie*, 471 U.S. at 47). The Court has held that the active supervision requirement applies to private parties *(e.g., Midcal; Patrick; Ticor)*, and does not apply to political subdivisions of the State such as municipalities *(e.g., Hallie)*. Respondent argues, however, that the Court has never ruled directly on the question of whether state agencies must be supervised too, and therefore we should take our guidance from a footnote suggesting they need not[10] and from lower court cases in accord.

Whatever the case may be with respect to state agencies generally, however, the Court has been explicit in applying the antitrust laws to public/private hybrid entities, such as regulatory bodies consisting of market participants. The Court's jurisprudence in this area leads us to conclude that when determining whether the state's active supervision is required, the operative factor is a tribunal's degree of confidence that the entity's decision-making process is sufficiently independent from the interests of those being regulated. As the Court emphasized repeatedly, the "real danger" in not insisting on the state's active supervision is that the entity engaged in the challenged restraint turns out to be "acting to further [its] own interests, rather

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[10] Bd. Memo at 30 n.7 (quoting *Hallie*, 471 U.S. at 46 n.10).

than the governmental interests of the State." *Hallie*, 471 U.S. at 47; *Patrick*, 486 U.S. at 100.

Thus, in *Goldfarb v. Virginia State Bar*, a fee schedule for real estate title searches that was enforced by the Virginia state bar was found to violate the antitrust laws, even though the enforcement agency was "a state agency by law." 421 U.S. 773, 783, 790 (1975). The Court's reasoning in that case is particularly illuminating. The Court rejected the state action defense, in part, because the state bar's enforcement of the unlawful fee schedule via its issuance of ethical opinions was deemed to be undertaken "for the benefit of its members," and, equally significantly, "there was no indication that the Virginia Supreme Court approves the [ethical] opinions." *Id.* at 790-91. We draw two conclusions from *Goldfarb*. First, as the Court reasoned, "that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices *for the benefit of its members*." *Id.* at 791 (emphasis added). Thus, the inquiry into the public/private character of the governmental entity's challenged conduct should focus not on the formalities of state law (after all, the subject entity in *Goldfarb* was "a state agency by law," *id.* at 790), but rather on the realities of the decision-maker's independent judgment. The state bar's enforcement of a minimum fee schedule was deemed clearly for the benefit of its member lawyers, not the general public. Second, it seems reasonable to conclude that had the state's supervisory role, in the form of the Virginia Supreme Court's approval of the state bar's ethical opinions, been more vigorous, the Court's conclusion on the application of the state action

doctrine may well have been different. Instead, the Court's analysis strongly suggests that such active supervision is crucial, even for a state agency, in circumstances where the state agency's decisions are not sufficiently independent from the entities that the agency regulates.

Although the courts of appeals have been less than consistent on this issue, there is ample support for the proposition that financially interested governmental bodies must meet the active supervision prong of *Midcal*. *See, e.g.*, *Wash. State Elec. Contractors Ass'n, Inc. v. Forest*, 930 F.2d 736, 737 (9th Cir. 1991) (whether an entity must show active supervision depends on the realities of its structure, such as having private members who "have their own agenda which may or may not be responsive to state policy"); *FTC v. Monahan*, 832 F.2d 688, 689-90 (1st Cir. 1987) (Breyer, J.) ("[W]hether any 'anticompetitive' Board activities are 'essentially' those of private parties" and hence subject to active supervision "depends upon how the Board functions in practice, and perhaps upon the role played by its members who are private pharmacists."); *Norman's on the Waterfront, Inc. v. Wheatley*, 444 F.2d 1011, 1018 (3rd Cir. 1971) (in determining whether state action exemption applies to a state regulatory board, "the relevant distinction is between genuine governmental action controlling the anticompetitive practice, and an attempt by government officials to 'authorize individuals to perform acts which violate the antitrust laws'") (quoting *Asheville Tobacco Bd. of Trade, Inc. v. FTC*, 263 F.2d 502, 509 (4th Cir. 1959)); *Asheville Tobacco Bd.*, 263 F.2d at 509 ("[T]he state may regulate that industry in order to control or, in a proper case, to

eliminate competition therein. It may even permit persons subject to such control to participate in the regulation, provided their activities are adequately supervised by independent state officials.") (citation omitted).

Leading antitrust commentary supports this view. In their antitrust treatise, for example, Professors Areeda and Hovenkamp also reject the formalities of a governmental body's status under state law in determining whether active supervision should be deemed necessary. They conclude that it is good policy to classify as "private" for state action purposes "any organization in which a decisive coalition (usually a majority) is made up of participants in the regulated market." Phillip E. Areeda & Herbert Hovenkamp, 1A ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 227b, at 501 (3d ed. 2009); *see also id.* ¶ 224a, at 500 ("Without reasonable assurance that the body is far more broadly based than the very persons who are to be regulated, outside supervision seems required."). Professor Elhauge, moreover, concludes that "financially interested action is always 'private action' subject to antitrust review." Einer Richard Elhauge, *The Scope of Antitrust Process*, 104 HARV. L. REV. 667, 689 (1991); *see also id.* at 696 ("[A]n anticompetitive restraint is immune from antitrust liability whenever a financially disinterested and politically accountable actor controls and makes a substantive decision in favor of the terms of the restraint.").

Lastly, requiring active supervision by the state itself in circumstances where the state agency in question has a financial interest in the restraint that

the agency seeks to enforce, especially when the state agency is not accountable to the public but rather to the very industry it purports to regulate, is entirely consistent with the policies underlying the *Parker* doctrine. The Supreme Court created the state action doctrine in recognition that states, in their sovereign capacities, may choose to supplant competition to effect other policy goals. A state decision to take action that contravenes the antitrust laws in theory represents a choice by citizens of that state to forego the benefits of competition in favor of alternative ends. If a state legislature adopts a policy that restricts competition against the wishes of its citizens, it faces political consequences. The Court has explained that the rationale behind the *Midcal* requirements is to assure political accountability:

> States must accept political responsibility for actions they intend to undertake. Federalism serves to assign political responsibility, not to obscure it. Neither federalism nor political responsibility is well served by a rule that essential national policies are displaced by state regulations intended to achieve more limited ends. For States which do choose to displace the free market with regulation, our insistence on real compliance with both parts of the *Midcal* test will serve to make clear that the State is responsible for the price fixing it has sanctioned and undertaken to control.

Ticor, 504 U.S. at 635. Accordingly, if a state permits private conduct to go unchecked by market forces, the only assurance the electorate can have that private parties will act in the public interest is if the state is

politically accountable for any resulting anticompetitive conduct; when conduct subject to political review is not in the public interest, it can be stopped at the ballot box. Decisions that are made by private parties who participate in the market that they regulate are not subject to these political constraints unless these decisions are reviewed by disinterested state actors to assure fealty to state policy. Without such review, "there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests." *Patrick v. Burget*, 486 U.S. 94, 101 (1988). Therefore, allowing the antitrust laws to apply to the unsupervised decisions of self-interested regulators acts as a check to prevent conduct that is not in the public interest; absent antitrust to police their actions, unsupervised self-interested boards would be subject to neither political nor market discipline to serve consumers' best interests.

Although requiring active supervision of state regulatory bodies that are controlled by private market participants may impose additional costs on states, we believe that this rule is faithful to the Supreme Court's decisions striking the correct balance between our national policy in favor of competition, on the one hand, and principles of federalism on the other. As discussed above, the risk to competition posed by regulatory bodies comprising private market participants is greater than the risk posed by elected representatives, who are accountable directly to the public. At the same time, deference to policy-making by private parties who occasionally are cloaked in a modicum of state authority does not vindicate federalism to the same

degree as granting the state sovereign itself wide berth to regulate markets.

We find unconvincing the Board's arguments that a regulatory body controlled by private market participants should not be asked to show active state supervision of its exclusionary conduct. The Board first relies on certain decisions of the courts of appeal that found state agencies need not show active supervision, even in circumstances where the Board's independent judgment and control are not manifest. *See* Bd. Opp. at 18 (citing *Earles v. State Bd. of Certified Public Accountants of Louisiana*, 139 F.3d 1033, 1041 (5th Cir. 1998); *Bankers Ins. Co. v. Florida Residential Property & Casualty Joint Underwriting Ass'n*, 137 F. 3d 1293, 1296-97 (11th Cir. 1998); *Hass v. Oregon State Bar*, 883 F.2d 1453, 1460 (9th Cir. 1989); *Gambrel v. Kentucky Board of Dentistry*, 689 F.2d 612 (6th Cir. 1982)). These decisions, however, appear in large part to be based on those courts' examination of a laundry list of attributes of the respective governmental entities (e.g., open records, general financial and ethical oversight) to determine the extent to which they resembled the municipality in *Hallie*, rather than an inquiry into whether the challenged restraint was effected by a body controlled by market participants who stood to benefit from the regulatory action. *See, e.g., Earles*, 139 F.3d at 1041 (examining a list of factors and concluding that "the Board is functionally similar to a municipality"); *Hass*, 883 F.2d at 1460 (state law provisions governing its public records and meetings, financial audits, and ethical conduct "leave no doubt that the Bar is a public body, akin to a municipality, for the purposes of the state action exemption."). The Eleventh Circuit in *Bankers*

Insurance, moreover, appeared to find the fact that the members of the underwriting association *did not* compete in the market that they regulated key to its decision not to require active supervision. 137 F.3d at 1297 ("This impossibility of competition is an indicator that the Association represents public interests, rather than competing private interests.").[11] *Gambrell*, a case on which the respondent relies heavily, is also distinguishable from the instant case. There, the Kentucky Board of Dentistry was enforcing a clear, unambiguous legislative prohibition on denture producers taking orders from anyone other than licensed dentists. 689 F.2d at 618 (defendant's conduct "emanates directly from the mandate of the state law in a well-developed and long-established statutory scheme. It is not left to the private sector to decide what the policy is and whether it is to be complied with."). Here, by contrast, the Board has exercised discretion to implement a policy to exclude non-dentists from a market in which they compete against North Carolina dentists. Accordingly, with the possible exception of *Earles*, which we decline to follow, we do not read these cases to be contrary to our holding here.[12]

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[11] Further, the rule at issue in Hass required participation in a malpractice insurance pool; the challenged regulation did not implicate competition among the regulators themselves. Although the *Hass* court did not focus on this fact as a ground for its decision, the absence of such competition suggests that there was limited danger that private parties were "further[ing their] own interests, rather than the governmental interests of the State." *Town of Hallie*, 471 U.S. at 47.

[12] As Complaint Counsel points out in its opposition memorandum, *see* CC Opp. at 7 n.8, the *Earles* court's reliance

The Board also argues that *Goldfarb* and *Bates* predate *Hallie*'s dicta that state agencies likely would not be required to show active state supervision, and thus those cases should not be accorded much weight in our analysis. Bd. Reply at 10. We disagree. First, *Midcal*'s two-pronged test itself was extracted from the Court's prior state-action decisions, including *Goldfarb*. *See* 445 U.S. at 104-05 ("These decisions establish two standards for antitrust immunity under *Parker v. Brown*") (referring to *Goldfarb*, *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976); *and New Vehicle Motor Bd. of Cal. v. Orrin W. Fox Co.*, 439 U.S. 96 (1978)). A Supreme Court decision that is directly on point here should not be ignored because of a subsequent passing comment by the Court, especially when the *Hallie* Court made it amply clear that it was not deciding the state agency issue. *See Hallie*, 471 U.S. 46 n. 10. Second, the dicta in footnote 10 of *Hallie* must be reconciled with the Court's other language and reasoning in that same decision. The *Hallie* Court distinguished *Goldfarb* and *Cantor* on the basis that those cases "concerned private parties not municipalities." *Id.* at 45. The party claiming the state action exemption in *Goldfarb* was the Virginia State Bar, explicitly acknowledged by the Court to be "a state agency by law." *See Goldfarb*, 421 U.S. at 789-90. Yet, the *Hallie* Court

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on cases it perceived as relevant precedents, but which do not in fact involve regulatory bodies controlled by private market participants, confirms our view that the court's holding there is not squarely on point with the allegations here. Moreover, unlike the Board here, the Earles Board members "are chosen by the governor and they must be confirmed by the state senate," 139 F.3d at 1035, thus providing some of the political accountability lacking in this case.

distinguished the Virginia State Bar from a municipality, on the ground that the latter "is an arm of the State" and thus is presumed to "act[] in the public interest," while "[a] private party, on the other hand, may be presumed to be acting primarily on his or its own behalf." 471 U.S. at 45. Thus, the Court clearly did not view state regulatory bodies such as the Virginia State Bar as equivalent to municipalities with respect to their incentives to pursue public as opposed to private ends — and therefore excused from *Midcal*'s active supervision requirement — as the Board would have us read footnote 10 of the *Hallie* opinion. The *Hallie* Court based its public/private distinction on the realities of the specific economic interests involved, as we do here.

We accordingly hold that a state regulatory body that is controlled by participants in the very industry it purports to regulate must satisfy both prongs of *Midcal* to be exempted from antitrust scrutiny under the state action doctrine.[13] We further conclude that the Board is such a state regulatory body. Because North Carolina law requires that six of the eight Board members be North Carolina licensed dentists, the Board is controlled by North Carolina licensed dentists. *See* CCSMF at 1, ¶ 1; BSMF, at 6, ¶ 1; N.C. Gen. Stat. § 90-22(b). Although there may be some factual dispute over the relative importance of teeth whitening revenues to a dental practice's total

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[13] Because the Board is so clearly controlled by market participants, we need not consider the extent to which the active supervision prong should apply to state regulatory bodies comprising other types of private actors, where the risk of harm to competition and the level of political accountability might be balanced differently.

revenues, the undisputed facts show that North Carolina dentists — including some of those dentists who complained to the Board about non-dentist teeth whitening — perform teeth whitening in their private practices. *See* CCSMF at 11-12, ¶¶ 37-40; BSMF at 21-23, ¶¶ 37-40. Non-dentists also provide teeth whitening services in North Carolina, and advertise themselves as a lower-priced alternative for dentist teeth whitening. CCSMF at 6, 9, ¶¶ 23, 30; BSMF at 14, 18, ¶¶ 23, 30. Under these circumstances, "common sense and economic theory, upon both of which the FTC may rely," *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 456 (1986), dictate the conclusion that Board actions in this area could be self interested. Absent some form of state supervision, we lack assurance that the Board's efforts to exclude non-dentists from providing teeth whitening services in North Carolina represent a sovereign policy choice to supplant competition rather than an effort to benefit the dental profession.

Our conclusion that the Board must meet the active supervision requirement is reinforced by the Board's accountability to North Carolina's licensed dentists; the six dentist members of the Board are elected directly by their professional colleagues, the other licensed dentists in North Carolina. N.C. Gen. Stat. § 90-22(b); *see also* CCSMF at 1, ¶¶ 1-3; BSMF at 6, ¶¶ 1-3. The dentist members of the Board can run for reelection, and some of them have served two or more terms. CCSMF at 1, ¶ 4; BSMF at 6-7, ¶ 4. The Board's judgment under such economic and political pressures can hardly be characterized as sufficiently independent that the Board may bypass active supervision by the state, yet still enjoy the

antitrust exemption accorded only to a state's sovereign acts.

The Board argues that Complaint Counsel has presented no evidence that the individual dentist members of the Board have a financial conflict of interest or that they derived substantial revenues in their private practice from teeth whitening services. *See, e.g.*, Bd. Memo at 38, 40; Bd. Reply at 13-14. We find this argument unpersuasive. First, we hold that the determinative factor in requiring supervision is not the extent to which individual members may benefit from the challenged restraint, but rather the fact that the Board is controlled by participants in the dental market. North Carolina dentists stand to reap economic gains when the Board takes actions to exclude non-dentists from competing to provide certain services. Second, although our holding is not predicated on the Board members' actual financial interests, the undisputed facts show that many of the Board members do perform teeth whitening in their private practice. *See* Feingold Tr. 183:13-22; Holland Tr. 58:9-16; Wester Tr. 26:24-28:2; Hall Tr. 33:15-34:25; Allen Tr. 18:1-17. Third, Respondent's reference to conflicts of interest is misplaced. The complaint allegations here, and the policies underlying the *Midcal* test for antitrust exemption, do not concern issues of official misconduct or unethical behavior — which might be addressed by a state ethics law — but rather target the incumbent dentists' efforts to exclude their competitors from a particular economic market.[14] That alleged conduct

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[14] As discussed *infra*, the Ethics Commission review for financial conflicts of interest does not include an examination of substantive Dental Board policies.

lies at the heart of the federal antitrust laws, and is the only conduct with which we deal here.

The Board points to the various ways in which the State of North Carolina purportedly "is heavily involved in the State Board's proceedings," and argues that the Board thus meets the criteria articulated in *Hass* and *Bankers Insurance* that would allow it to bypass the active supervision requirement. Bd. Memo at 32-33. As discussed above, however, rather than formalities such as financial audits of Board funds and taking oaths to uphold the state law, the most salient factor to consider in determining whether active state supervision ought to be required is that the Board is controlled by members who continue to participate in the private market that the Board is charged with regulating. This latter factor, bolstered in this case by the fact that the Board members are selected by other North Carolina dentists, strongly suggests a lack of judgment and control independent of the regulated industry, which are the hallmarks of the *Midcal* active supervision test.

Accordingly, we conclude that for the Board to succeed in its claim of antitrust exemption under the state action doctrine, it must show that it satisfies both prongs of *Midcal*.

2. The Board's Conduct Was Not Actively Supervised

The Board argues that even if it were subject to *Midcal*'s active supervision requirement, the state of North Carolina's oversight of the Board would be sufficient to confer state action protection. *See* Bd. Memo at 34; Bd. Reply at 16-17. We disagree. As discussed above, the active supervision requirement

exists to guarantee that self-interested parties are restricting competition in a manner consonant with state policy. In this manner, the active supervision converts private conduct, which is subject to antitrust review, into a sovereign policy choice, which is not. Toward this end, the active supervision requirement "mandates that the State *exercise* ultimate control over the challenged anticompetitive conduct[;] [t]he mere presence of some state involvement or monitoring does not suffice." *Burget*, 486 U.S. at 101 (emphasis added); *see also 324 Liquor Corp. v. Duffy*, 479 U.S. 335, 345 n. 7 (1987) (holding that certain forms of state scrutiny of a private restraint did not constitute active supervision because they did not exert "any significant control over" the terms of the restraint); *Midcal*, 445 U.S. at 105-06 (California system for wine pricing fails the active supervision requirement because "[t]he State does not. engage in any 'pointed reexamination' of the program"); *Parker*, 317 U.S. at 352 (stressing that the challenged marketing plan could not take effect unless approved by state board).

On prior occasions, the Commission has explained that it would consider the following elements in determining *whether* a state has actively supervised private anticompetitive conduct: (1) the development of an adequate factual record; (2) a written decision on the merits; and (3) a specific assessment — both quantitative and qualitative — of how the private action comports with the substantive standards established by the legislature. *See* Opinion of the Commission, *Kentucky Household Goods Carriers Ass'n*, 139 F.T.C. 405, 420-21 (2005), *aff'd sub nom. Kentucky Household Goods Carriers Ass'n v. FTC*, 199 Fed. Appx. 410, 2006 WL 2422843

(6th Cir. 2006); *see also Analysis of Proposed Order to Aid Public Comment, Indiana Household Movers and Warehousemen, Inc.*, 135 F.T.C. 535, 555-561 (2003); Federal Trade Commission, Office of Policy Planning, Report of the State Action Task Force 55 (Sept. 2003). Although no single one of these elements is necessarily a prerequisite for active supervision, the Board has presented no evidence that any of these elements are satisfied here. The lack of any evidence that an arm of the State of North Carolina developed a record, or rendered a decision that assessed the extent to which the Board's policy toward non-dentist teeth whitening comported with North Carolina state policy, strongly suggests a lack of state supervision.

Respondent cites a litany of North Carolina statutes and constitutional provisions as evidence that the Board's actions are subject to review by various state entities. *See, e.g.*, BSMF at 51-53, ¶ 72. Most of these laws are irrelevant to the active supervision inquiry.[15] Other, potentially more

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[15] *See, e.g.*, N.C. Gen. Stat. § 6-19.1 (attorney's fees to parties appealing or defending against agency decision); N.C. Gen. Stat. § 7A-3 (judicial power, transition provisions); N.C. Gen. Stat. § 50-13.12(a)(l) (forfeiture of licensing privileges for failure to pay child support or for failure to comply with subpoena issued pursuant to child support or paternity establishment proceedings); N.C. Gen. Stat. § 55B-2(3) (definition of professional corporation); N.C. Gen. Stat. §§ 66-58(a) & (e) (sale of merchandise by government units); N.C. Gen. Stat. §§ 66-68(a) & (e) (certificate to be filed; contents; exemption of certain partnerships and limited liability companies engaged in rendering professional services; withdrawal or transfer of assumed name); N.C. Gen. Stat. § 114-8.2 (charges for legal services); N.C. Gen. Stat. §115C-457.1 (creation of civil penalty forfeiture fund; administration); N.C. Gen. Stat. §115D-89 (state

relevant provisions of North Carolina law that the Board highlights as evidence of active supervision include requirements that: each Board member submit detailed financial disclosures to the Ethics Commission; the Board submit an annual report to the Secretary of State, the State Attorney General, and the JLAPOC; and the Board submit an annual audited financial report. *See* Bd. Opp. at 29; BSMF at 51-53, ¶ 72. This sort of generic oversight, however, does not substitute for the required review and approval of the "*particular* anticompetitive acts" that the complaint challenges. *Patrick*, 486 U.S. at 101 (emphasis added). For instance, the Board's annual reports provide only aggregate information on the number and disposition of investigations by type, providing no hint as to the underlying substance of any of these matters, let alone a discussion of the Board's policy toward non-dentist teeth whitening. *See* CCSMF at 22, ¶ 74; CX0085; CX0086; CX0088; CX0089; CX0091. Board members' financial disclosures to the Ethics Commission list only their assets and liabilities, state that they are engaged in the practice of dentistry, and identify the professional associations to which they belong and businesses other than their dental practices. *See* CCSMF at 22-23, ¶¶ 75-76; Newson Decl. at 5, ¶ 11; CX0395; CX0396. The declaration of the Executive Director of the North Carolina Ethics Commission states that "the Commission has not assessed whether

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board of community colleges to administer Article; issuance of diplomas by schools; investigation and inspection; rules); N.C. Gen. Stat. § 147-69.3 (administration of State Treasurer's investment programs); N.C. Gen. Stat. §§ 153A-134,160A-194 (regulating and licensing businesses).

Dental Board members have sought to regulate or restrict the business practices of non-dentist providers of teeth whitening services." Newson Decl. at 6, ¶ 14; *see also id.* at 6, ¶ 15 ("The Commission's primary focus is on the avoidance of unlawful conflicts of interest by individual members of covered Boards and other entities; not on the specific substantive actions taken by covered boards."). Similarly, the Board's audited financial statements include no information regarding the Board's actions generally, or its policy regarding non-dentist teeth whitening, specifically. *See* CCSMF at 22, ¶ 73.

In sum, none of these legislative provisions suggest that a state actor was even aware of the Board's policy toward non-dentist teeth whitening, let alone reviewed or approved it in fulfillment of the active supervision requirement.

The Board also points to requirements that it comply with North Carolina's Public Records Act, Administrative Procedure Act, and open meetings law when conducting its business, *see* Bd. Opp. at 29, and to the JLAPOC's power "[t]o review the activities of the State occupational licensing boards to determine if the boards are operating in accordance with statutory requirements." N.C. Gen. Stat. § 120-70.101(3a).[16] The Board, however, presents no

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[16] It is unclear whether the JLAPOC even has the ability to review the Board's non-dentist teeth whitening policy to the extent that the Board's actions were classified as "individual disciplinary actions." *See* N.C. Gen. Stat. § 120-70.101(3a) (JLAPOC review "shall note include decisions concerning individual disciplinary actions."). Further, the open records requirement does not guarantee that enforcement actions regarding the unauthorized practice of dentistry will not be

evidence that any state actor became aware of the Board's non-dentist teeth whitening policy pursuant to these, or any other, provisions of North Carolina law. Even had these provisions made a disinterested state actor aware of the Board's non-dentist teeth whitening policy, moreover, the Board provides no evidence that the JLAPOC, or any other state actor, reviewed or approved the Board's challenged conduct. For state action purposes, silence on the part of the state does not equate to supervision. In *Ticor*, for example, the Supreme Court rejected the argument that private conduct was adequately supervised when the state merely was made aware of privately-set rates and took no action, holding that "[t]he mere potential for state supervision is not an adequate substitute for a decision by the State." 504 U.S. at 638. Rather, to satisfy the active supervision standard, a state official must "have *and* exercise power to review particular anticompetitive acts." *Patrick*, 486 U.S. at 101 (emphasis added). Further, the Supreme Court has made clear that ex-post consideration of a restraint via the political process is also insufficient to satisfy *Midcal*'s active supervision requirement. *See Lafayette*, 435 U.S. at 406; *Duffy*, 479 U.S. at 345. Accordingly, the mere fact that the Board's decisions possibly could have been discovered by the public or subject to review by the JLAPOC is not active supervision for state action purposes.

The Board also argues that several other means by which it could exclude non-dentists from performing teeth whitening are subject to state supervision. *See* Bd. Memo at 35. For example, a

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addressed in closed session. *See* Board's Resp. and Objections to Compl. Counsel's First Set of RFAs at 17, ¶ 44.

criminal suit or civil suit to enjoin illegal teeth whitening must be brought in a North Carolina court; a rule on teeth whitening is subject to the state's Administrative Procedure Act and subject to review by legislative committees; and a binding interpretation of the Dental Practice Act regarding teeth whitening must be made pursuant to the state's Administrative Procedure Act. *Id.* Even if ex-post review by a North Carolina court of the Board's decision to classify teeth whitening as the practice of dentistry were to constitute adequate supervision — an issue on which the Supreme Court has yet to decide, *see Burget*, 504 U.S. at 104, and which we do not address — the Board did not choose this path. Rather, the Board evaded judicial review of its decision to classify teeth whitening as the practice of dentistry by proceeding directly to issue cease and desist orders purporting to enforce that unsupervised decision.[17] Similarly, although ex-post judicial, legislative, or executive review of a formal rule making or binding interpretation of the Dental Practice Act might constitute adequate supervision for state action purposes in some circumstances, the Board chose to forgo these formal means to address non-dentist teeth whitening.

In the end, the Board has presented no evidence to suggest that its decision to classify teeth whitening

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[17] Our holding is not meant to suggest that the Board must always proceed directly to court against individuals whom it suspects may be involved in the unauthorized practice of dentistry. For example, the Board may be authorized to send warning letters as incidental to its authority to bring civil actions. We hold only that for the Board to enjoy state action exemption from the antitrust laws, the state of North Carolina must supervise the Board's actions that restrain competition.

as the practice of dentistry and to enforce this decision with cease and desist orders was subject to any state supervision, let alone sufficient supervision to convert the Board's conduct into conduct of the state of North Carolina.

* * *

We conclude that because the Board is controlled by practicing dentists, the Board's challenged conduct must be actively supervised by the state for it to claim state action exemption from the antitrust laws. Because we find no such supervision, we hold that the antitrust laws reach the Board's conduct.

VI. CONCLUSION

For the reasons discussed above, we deny the Board's motion to dismiss (which we have treated as a motion for summary decision) based on a claim of state action exemption from the antitrust laws, and we grant Complaint Counsel's motion for partial summary decision on the same issue. We issue herewith an order rejecting the Board's invocation of the state action doctrine as a basis for exempting its challenged conduct from the federal antitrust laws.

APPENDIX C

In the Matter of

THE NORTH CAROLINA BOARD OF DENTAL EXAMINERS
Docket No. 9343

Opinion of the Commission

By ROSCH, Commissioner, For A Unanimous Commission:[1]

I. INTRODUCTION [2]

This case involves the efforts of the North Carolina State Board of Dental Examiners ("Respondent" or the "Board") to prevent non-dentists from providing teeth whitening services in North Carolina. The Board is an agency of the State of North Carolina and is charged with regulating the practice of dentistry in the state. By law, six of the

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[1] Commissioner Julie Brill has not participated in this matter.

[2] This opinion uses the following abbreviations for citations to the record:

Initial Decision	ID
ALJ Findings of Fact	IDF
Respondent's Appeal Brief	RAB
Complaint Counsel's Answering Brief on Appeal	CCAB
Respondent's Reply Brief on Appeal	RRB
Complaint Counsel's Exhibit	CX
Respondent's Exhibit	RX
Trial Transcript	Tr.

eight members of the Board must be practicing dentists.

In the early 1990s, dentists in North Carolina and elsewhere began offering teeth whitening services through the use of various forms of peroxide. Since then, teeth whitening has become one of the most popular cosmetic dentistry procedures and is now offered by most dentists either as an in-office procedure or as a custom-made take-home kit.

In response to the popularity of teeth whitening, non-dentists began offering teeth whitening services at locations such as mall kiosks, spas, retail stores, and salons in North Carolina in approximately 2003. These providers use techniques similar to those used by dentists to whiten teeth and, like dentists, can whiten teeth in a single session. However, non-dentist providers charge significantly less than dentists for the procedure and often offer greater convenience.

Dentists who performed teeth whitening services soon began complaining to the Board about the provision of teeth whitening services by non-dentists. These complaints often noted that these new providers charged less than dentists but rarely mentioned any public health or safety concerns. In response to these complaints, the Board issued dozens of cease and desist letters to non-dentist teeth whitening service providers and distributors of teeth whitening products and equipment. In addition, the Board sent letters to mall owners and operators urging them not to lease space to non-dentist teeth whitening providers. The Board had no authority to issue cease and desist orders under its enabling statute.

As a result of the Board's actions, many non-dentists stopped providing teeth whitening services and several marketers of teeth whitening systems stopped selling their products and equipment in North Carolina. In addition, several mall operators refused to lease space to, or cancelled existing leases with, non-dentist teeth whitening providers.

Based on our *de novo* review of the facts and law in this matter, we conclude that the Board sought to, and did, exclude non-dentist providers from the market for teeth whitening services in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. We agree with Chief Administrative Law Judge D. Michael Chappell (the "ALJ") that Respondent's conduct constituted concerted action, that Respondent's conduct had a tendency to harm competition and in fact did harm competition, and that Respondent has failed to advance a legitimate procompetitive justification. We find liability under an abbreviated, or quick look, approach as well as under a full rule of reason analysis. We agree with the ALJ that the appropriate remedy is to prohibit the Board from directing non-dentist teeth whitening providers to cease providing their teeth whitening products or services, and we adopt (with minor changes) the Order entered below.

II. FACTUAL BACKGROUND

The following is a summary of the findings of fact of the ALJ. Except as noted, Respondent does not challenge the ALJ's findings. We adopt the ALJ's findings of fact to the extent that they are not inconsistent with this opinion.

The Board

The North Carolina State Board of Dental Examiners is an agency of the State of North Carolina and is charged with regulating the practice of dentistry in the interest of public health, safety, and welfare of the citizens of North Carolina. (IDF 1, 33, 87.) The Board has the authority to issue and renew licenses and to take disciplinary action against dentists practicing in North Carolina. (IDF 35.) The Board is funded by dues and fees paid by licensed dentists and dental hygienists in North Carolina. (IDF 13-14.)

The Board consists of eight members: six licensed dentists, one licensed dental hygienist, and one consumer member, who is neither a dentist nor a dental hygienist. (IDF 2.) Each dentist elected to the Board must be licensed and actively engaged in the practice of dentistry while serving on the Board. (IDF 6-8.) The six dentist members of the Board are elected to the Board by other licensed dentists in North Carolina and, if an election is contested, a candidate may describe his or her positions on issues that may come before the Board. (IDF 15-23.) Many Board members have provided teeth whitening services through their private practices and derived income from those services while serving on the Board. (IDF 9-12.)

The Dental Practice Act provides that it is unlawful for an individual to practice dentistry in North Carolina without a license from the Board. *See* N.C. General Statutes § 90-29(a); IDF 41. Under the Dental Practice Act, a person "shall be deemed to be practicing dentistry" if that person "[r]emoves stains, accretions or deposits from the human teeth." N.C. General Statutes § 90-29(b)(2); IDF 42. In the

event of a suspected unlicensed practice of dentistry, the Board may bring an action to enjoin the practice in North Carolina Superior Court or may refer the matter to the District Attorney for criminal prosecution. *See* N.C. General Statutes § 90-40.1; IDF 43, 44, 190; Response to Complaint ¶ 19; RAB at 2-3; RRB at 5. The Board does not have the authority to discipline unlicensed individuals or to order non-dentists to stop violating the Dental Practice Act. *See* N.C. General Statutes §§ 90-27, -29, -40, -40.1; IDF 45-49.

Teeth Whitening Services

There are four categories of teeth whitening products or services available in North Carolina: dentist in-office services, dentist-provided take-home kits, services provided by a non-dentist, and over-the-counter (OTC) products.[3] (IDF 105.) All four methods involve the application of some form of peroxide to the teeth using a gel or strip. (IDF 106, 151.) All four methods trigger a chemical reaction that results in whiter teeth. (IDF 106.)

Despite their similar characteristics, the four techniques vary in terms of immediacy of results,

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[3] At pages 16 and 17 of Respondent's appeal brief, Respondent objects to Finding 100, which identifies various techniques to whiten teeth, because the ALJ's use of the phrase "through dental stain removal" could be interpreted — despite the ALJ's statements to the contrary (*see, e.g., ID.* at 82, 109) — as a reference to the Dental Practice Act's definition of the practice of dentistry as a person that "removes stains." N.C. General Statutes § 90-29(b)(2). Respondent's interpretation of Finding 100 is questionable, but, for clarity, we strike the phrase "through dental stain removal" from Finding 100 and otherwise affirm that finding.

ease of use, provider support, and price. (IDF 107.) Dentist in-office services are quick, effective, and provided by a professional, but are costly compared to the other methods and require making an appointment. (IDF 108-20.) Take-home kits provided by dentists are effective and somewhat less expensive than in-office services but require the user to apply the product at home a number of times and usually require at least two trips to the dentist. (IDF 121-28.) Non-dentist services (like dentist in-office services) are quick and effective but are typically priced below dentist services and may not require an appointment.[4] (IDF 137-50.) OTC products are low cost and convenient but require diligent and repeated application by the consumer. (IDF 129-36.) Consumers' preferences with respect to efficacy, cost, and convenience vary (IDF 169, 172, 174), and there is competition among providers offering the different methods of teeth whitening (IDF 157, 158), including

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[4] Respondent argues that Findings 140 and 141 are flawed because Complaint Counsel's expert, Dr. Martin Giniger, lacked foundation for his testimony concerning the bleaching process used by non-dentist teeth whitening systems. (RAB at 17.) These findings are not material to the Commission's resolution of this matter and, in any event, Dr. Giniger had an adequate foundation for this testimony. Dr. Giniger has published numerous articles in peer-reviewed publications on teeth whitening (Giniger, Tr. 88-91; CX653 at 56-59), has taught dental students about teeth whitening (Giniger, Tr. 93-94), holds nine patents related to teeth whitening (Giniger, Tr. 95; CX653 at 55), has provided consulting services to several companies making teeth whitening products including those marketed to non-dentist providers (Giniger, Tr. 98; CX653 at 2; IDF 81), and reviewed the manuals for two companies offering non-dentist teeth whitening systems (CX653 at 22).

through the use of comparative advertising (IDF 163-68).

The Board's Cease and Desist Letters

The Board conducts investigations of allegations that persons are engaged in the unauthorized practice of dentistry. (IDF 175.) Complaints to the Board regarding the unauthorized practice of dentistry are handled by an investigative panel consisting of a case officer, the Deputy Operations Officer, an Investigator, and sometimes the Board's legal counsel. (IDF 181-83.) The case officer, who must be one of the dentists serving on the Board, directs the investigation and is authorized by the Board to make enforcement decisions. (IDF 184-91.) The consumer member of the Board and the hygienist member of the Board did not participate in teeth whitening investigations, notwithstanding their authority to do so under the Dental Practice Act. (IDF 38-40, 59-60, 184, 192-93.)

Starting in or around 2003, the Board began receiving complaints from dentists about non-dentist providers of teeth whitening services. (IDF 194-95.) Almost all of these complaints came from licensed dentists (IDF 227, 229-30), many of whom derived income from teeth whitening services (IDF 233). Many of these complaints noted that these non-dentist providers offered low prices (IDF 196, 232); only on rare occasion did they indicate possible consumer harm (IDF 228, 231).

The Board discussed the increasing number of complaints regarding non-dentist teeth whitening services in its meetings. (IDF 198, 206.) On several occasions, Board members informed practicing dentists that the Board was investigating complaints

about non-dentist teeth whiteners and was attempting to shut down these providers.[5] (IDF 201, 205.)

Since 2006, the Board has sent at least 47 cease and desist letters to 29 non-dentist teeth whitening manufacturers and providers. (IDF 208-09, 216-18, 230, 262-83.) Starting in 2007 and at the direction of the Board's President, the Board began issuing cease and desist letters on the basis of a complaint, without any investigation. (IDF 210-15.) These letters were sent on the official letterhead of the Board and stated in capitalized lettering at the top: "NOTICE AND ORDER TO CEASE AND DESIST," "NOTICE TO CEASE AND DESIST," "CEASE AND DESIST NOTICE," or "NOTICE OF APPARENT VIOLATION AND DEMAND TO CEASE AND DESIST." (IDF 219, 220, 222, 223.) The letters go on to order the provider to cease and desist from "all activity constituting the practice of dentistry." (IDF 221-23.) Some of the letters stated that the sale or use of non-dentist teeth whitening products constituted a misdemeanor. (IDF 265-66, 280.) The Board's goal in sending these letters was to stop non-dentists from providing teeth whitening services. (IDF 234-45, 286-87.)

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[5] Respondent disputes Finding 205, which states that members of the Board told dentists attending a conference that the Board was investigating complaints about non-dentist teeth whiteners. (RAB at 18.) Respondent is correct that there was conflicting testimony on this point, but the weight of evidence — including the testimony of the Board's President and official Board meeting minutes—supports this finding. (CX565 at 67 (Hardesty Dep. at 259-61); CX109 at 3.)

The Board's cease and desist letters were effective in causing non-dentists to stop providing teeth whitening services in North Carolina. (IDF 247-56.) This was due in part to the perception of some recipients that the letters carried the force of law. (IDF 246.) The Board's letters were also effective in causing manufacturers and distributors of teeth whitening products used by non-dentist providers to exit or delay entering the North Carolina market.[6] (IDF 70-72, 267-70, 272, 277-79, 281-83.)

The Board's Letters to Mall Operators and the Cosmetology Board

In November 2007, the Board sent eleven letters to mall operators warning them that kiosk teeth whiteners were violating the Dental Practice Act and requesting that they not lease space to these operators. (IDF 97, 288-93.) As a result, some mall operators refused to lease space to non-dentist teeth whiteners or cancelled existing leases. (IDF 98, 294-313.)

Based on its understanding that many of the non-dentist teeth whitening providers were salons and spas regulated by the North Carolina Board of

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[6] Respondent asserts that Finding 268, which states that WhiteScience lost all of its sales in North Carolina as a result of the Board's actions, is inconsistent with testimony of the President of WhiteScience that his company continued to do business in North Carolina. (RAB at 17-18.) In fact, WhiteScience's President testified that the company did lose all of its sales in the state in response to the Board's actions but later reentered the state after learning that the Board would handle allegations of unauthorized practice of dentistry on a case-by-case basis. (Nelson, Tr. 735-36, 785-89, 800-01, 809-11; *see also* IDF 263-70, 278.)

Cosmetic Art Examiners ("cosmetology board"), the Board sought to enlist the aid of the cosmetology board in discouraging its licensees from providing teeth whitening services. (IDF 314-23.) In February 2007, the cosmetology board posted a notice on its website that was prepared by the Board suggesting that teeth whitening "constitutes the practice of dentistry" and that the "unlicensed practice of dentistry in our state is a misdemeanor." (IDF 320, 322.) As a result of the cosmetology board's posting, some cosmetologists stopped providing teeth whitening services. (IDF 324-27.)

III. PROCEDURAL HISTORY

A. PLEADINGS AND PRE-TRIAL MOTIONS

On June 17, 2010, the Commission issued a single-count Complaint in this matter against the Board. The Complaint alleged that the Board classified teeth whitening as the practice of dentistry and violated Section 5 of the FTC Act by enforcing this determination through cease and desist orders that were neither authorized nor supervised by the State, and that were designed to, and did, drive non-dentist teeth whiteners out of North Carolina.

The Complaint alleged that the Board, reacting to the competitive threat posed by non-dentist providers, sought to exclude, and did exclude, non-dentists from the market for teeth whitening services in North Carolina. (Compl. ¶¶ 13-23.) According to the Complaint, the Board sent dozens of cease and desist letters to non-dentist teeth whitening providers and distributors, discouraged prospective non-dentist providers from opening teeth whitening businesses, and sent letters to owners and operators of shopping malls to discourage their leasing space to

non-dentist teeth whitening businesses. (*Id.* ¶¶ 20-22.) These actions were allegedly not authorized by statute and did not involve any oversight by the State. (*Id.* ¶ 19.) The Complaint did not challenge any attempts by the Board to commence civil or criminal proceedings against alleged violators of the North Carolina Dental Practice Act, N.C. General Statutes § 90-22 *et seq.*

The Complaint alleged that the Board's actions have had the effect of restraining competition unreasonably and injuring consumers in North Carolina by preventing and deterring non-dentists from providing teeth whitening services; depriving consumers of the benefits of price competition; and reducing consumer choice for the provision of teeth whitening services. (*Id.* ¶¶ 24-25.) The Complaint further alleged that the Board's actions do not qualify for the state action defense and are not reasonably related to any efficiencies or other benefits sufficient to justify their harmful effect on competition. (*Id.* ¶ 23.) The Notice of Contemplated Relief attached to the Complaint seeks an order that would require Respondent to discontinue the challenged conduct.

The Board filed a Response to Complaint dated July 6, 2010. The Response admitted that the Board had sent letters to non-dentists offering teeth whitening services with the caption: "Notice and Order to Cease and Desist." (Response ¶ 20; *see also id.* ¶ 19 (acknowledging that the Board had sent "cease and desist letters").) The letters "inform[ed] the recipient of the investigation, quote[d] the applicable statute, and demand[ed] that the recipient stop violating that statute." (*Id.* ¶ 20.) The Response further admitted that the Board's staff had sent

letters to mall owners and property management companies requesting their "assistance in preventing *unlawful* activity on their premises," namely, "teeth whitening services by non-dentists." (*Id.* ¶ 22 (emphasis in original).) Respondent also admitted that Board staff had informed non-dentists who were considering opening teeth whitening businesses that such services could be performed only by a licensed dentist. (*Id.* ¶ 21.)

The Board's Response further admitted that "[a]ny enforcement actions by the Board against non-licensees who are providing teeth whitening services, whether civil or criminal, may only be pursued in the state's courts." (*Id.* ¶ 19; *see also id.* ("[N]o kiosk, spa or other provider of teeth whitening services by a non-dentist could actually be forced to stop operations unless the Board obtained either a court order or the cooperation of a district attorney in a criminal conviction and a court judgment.")) The Response otherwise denied the allegations of the Complaint, including the alleged product market, that concerted activity had occurred, that the cease and desist letters were orders, and that the Board's actions had caused anticompetitive effects in the purported relevant market.

As affirmative defenses, the Response asserted, among other things, that the Board is immune from suit under the state action doctrine, possesses sovereign immunity under the Eleventh Amendment, and is protected by the Tenth Amendment; that the Commission lacks subject matter jurisdiction; that the Board's actions had no substantial effect on U.S. commerce; and that the requested relief was not in the public interest. (*Id.* at 20-21.)

Prior to the start of the trial before the ALJ, Complaint Counsel and Respondent filed cross motions on the issue of the applicability of the state action doctrine to the Board's conduct. In an Opinion and Order dated February 3, 2011, the Commission rejected the Board's invocation of the state action doctrine as a basis for exempting its challenged conduct from the FTC Act. *See North Carolina Board of Dental Examiners*, 151 F.T.C. 607, 615-33 (2011). The Commission explained that because the Board is controlled by practicing dentists, the Board's challenged conduct must be actively supervised by the State for it to claim state action exemption from the antitrust laws. *Id.* at 617-28. Because the undisputed facts showed that there was no such supervision, the antitrust laws applied to the Board's conduct. *Id.* at 628-33. The Commission also concluded that it has jurisdiction over the Board because states and their regulatory bodies constitute "persons" under the FTC Act. *Id.* at 614-15.

On January 14, 2011, Respondent filed a motion to disqualify the Commission, asserting that the Commission lacks the constitutional authority to decide whether it has jurisdiction over the Board and had prejudged the issues in the proceeding. In a February 16, 2011 Opinion, the Commission denied Respondent's motion. *See North Carolina Board of Dental Examiners*, 151 F.T.C. 644 (2011). The Opinion concluded that the Commission has jurisdiction to decide whether the Board can avail itself of the state action exemption and that the Board had presented no evidence of prejudgment.

On February 1, 2011, Respondent filed a complaint for declaratory judgment and injunctive

relief in the United States District Court for the Eastern District of North Carolina. The complaint alleged that the FTC lacked jurisdiction over the Board and that these proceedings violated various constitutional rights of the Board. On May 3, 2011, the District Court dismissed the action for lack of subject matter jurisdiction, explaining that "the appropriate forum for plaintiff's arguments is in the administrative proceedings, followed by a potential appeal to the Fourth Circuit Court of Appeals." *North Carolina State Board of Dental Examiners v. FTC*, 768 F. Supp. 2d 818, 822 (E.D.N.C. 2011). Appeal of the dismissal is pending before the Fourth Circuit.

During the trial, which began on February 17, 2011 and concluded on March 16, 2011, the ALJ heard testimony from twelve fact and four expert witnesses and admitted more than eight hundred exhibits into evidence. The ALJ closed the hearing record on March 30, 2011. Complaint Counsel and the Board filed concurrent post-trial briefs and proposed findings on April 25, 2011 and filed replies on May 5, 2011. The ALJ heard closing arguments on May 11, 2011.

B. INITIAL DECISION

The ALJ issued an Initial Decision ("ID") on July 14, 2011, finding that the Board's concerted action to exclude non-dentists from the market for teeth whitening services in North Carolina constituted an unreasonable restraint of trade and an unfair method of competition in violation of Section 5 of the FTC Act. In particular, the ALJ found that dentist members of the Board had a common scheme or design, and hence an agreement, to exclude non-

dentists from the market for teeth whitening services and to deter potential providers of teeth whitening services from entering the market. To achieve this objective, dentist members of the Board caused the Board to (a) send letters to non-dentist teeth whitening providers ordering them to cease and desist from offering these services, (b) send letters to manufacturers of equipment used by non-dentist providers ordering them to cease and desist from assisting clients offering teeth whitening services, (c) send letters to dissuade persons considering opening non-dentist teeth whitening businesses, (d) send letters to owners or operators of malls to dissuade them from leasing space to non-dentist providers of teeth whitening services, and (e) elicit the help of the cosmetology board to dissuade its licensees from providing teeth whitening services. The ALJ concluded that these actions, by their nature, had the tendency to harm competition.

The ALJ found that the relevant market consists of teeth whitening services provided by dentists and non-dentists, but determined that the relevant market did not include self-administered teeth whitening products. The ALJ concluded that the Board had market power in the relevant market, as demonstrated by its ability to exclude non-dentist providers from the relevant market.

The ALJ found that the Board's concerted actions were effective in causing non-dentist teeth whitening providers to exit the relevant market, manufacturers to reduce the availability of their teeth whitening products to non-dentist providers, and mall owners and operators to stop leasing space to non-dentist providers.

The ALJ rejected the Board's proffered procompetitive justifications. The ALJ concluded that the antitrust laws do not permit a defense based on social welfare or public safety concerns, as asserted by the Board. In addition, the ALJ rejected Respondent's argument that teeth whitening services should be offered at a cost that reflects the skills of dentists as inimical to the basic policy of the antitrust laws. The ALJ also rejected Respondent's proffered justification that the Board's actions had the benefit of promoting legal competition. Finally, the ALJ observed that the Board's remaining justifications were essentially a reiteration of its state action argument, which had been rejected by the Commission.

As a remedy, the ALJ ordered the Board to cease and desist from directing a non-dentist to stop providing teeth whitening services or products, as well as from prohibiting or discouraging the provision of these goods and services. The ALJ's Order also requires the Board to cease and desist from communicating to certain third parties that non-dentist teeth whitening goods or services violate the Dental Practice Act. The ALJ's Order does not prohibit the Board from investigating, filing a court or administrative action, or communicating notice of its intent to file a court or administrative action against a non-dentist provider for an alleged violation of the Dental Practice Act.

C. APPEAL

Respondent timely filed a Notice of Appeal on July 28, 2011. Complaint Counsel did not file an

appeal from the Initial Decision. The Commission heard oral argument on October 28, 2011.[7]

Respondent makes three principal claims on appeal. Respondent first argues that no contract, combination, or conspiracy to restrain trade existed. In particular, Respondent asserts that the Board is not capable of engaging in concerted action because it does not consist of independent economic actors with distinct economic interests. (RAB at 11-15, 25-26.) In addition, Respondent argues that even if the members of the Board were capable of concerted action, there was no evidence to support a finding that they did so in this case.

Respondent's second principal claim on appeal is that several procompetitive justifications outweigh any harm to competition. (RAB at 7-10, 29-34.) Respondent asserts that the ALJ failed to consider that the Board's actions were those of a state agency that intended to and did promote the public welfare and thus enhanced legal competition.

Respondent's third principal claim on appeal is that the ALJ's proposed remedy is overbroad and will prevent the Board from investigating or challenging violations of the North Carolina Dental Practice Act. (RAB at 37.) Respondent also asserts that the proposed remedy violates the Commerce Clause of and Tenth Amendment to the United States Constitution. (RAB at 39-46.)

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[7] Complaint Counsel submitted a packet of materials to the Commission a few hours before oral argument. (Oral Argument Tr. 4-5, 37-38.) In light of Respondent's inability to meaningfully review or object to these materials in advance of oral argument, the Commission has given no consideration to the packet in reaching its decision.

In addition, Respondent seeks to relitigate two issues resolved in the Commission's February 3, 2011 Opinion and Order, namely the Commission's jurisdiction to hear this case and the applicability of the state action defense. (RAB at 22-24, 29-31.) We note, as an initial matter, that an appeal from an ALJ's Initial Decision is not the proper means by which to seek reconsideration of a Commission decision. In any event, Respondent has failed to identify any change in controlling law, new evidence, or a need to correct a clear error or manifest injustice that would warrant reconsidering our prior decision on either of these issues.[8]

IV. STANDARD OF REVIEW

The Commission reviews the ALJ's findings of facts and conclusions of law *de novo*, considering "such parts of the record as are cited or as may be necessary to resolve the issues presented." The Commission may "exercise all the powers which it could have exercised if it had made the initial decision."[9] Commission Rule 3.54, 16 C.F.R. § 3.54.

V. LEGAL FRAMEWORK

Although the reach of Section 5 of the FTC Act extends beyond that of Section 1 of the Sherman Act, *see FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233,

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[8] *See also* note 20, *infra* (addressing whether the Board is a "person" under the FTC Act).

[9] The *de novo* standard of review is required by the Administrative Procedure Act, 5 U.S.C. § 557(b), and the FTC Act, 15 U.S.C. § 45(b), (c), and applies to both findings of fact and inferences drawn from those facts. *See Realcomp II, Ltd.*, No. 9320, 2009 FTC LEXIS 250, *37 n. 11 (2009), *aff'd, Realcomp II, Ltd. v. FTC*, 635 F.3d 815 (6th Cir. 2011).

239 (1972), in this case we follow the standards of Section 1 to assess whether the challenged actions of the Board violate Section 5. *See California Dental Ass'n v. FTC*, 526 U.S. 756, 762 & n.3 (1999); *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 451-55 (1986); *FTC v. Cement Institute*, 333 U.S. 683, 694 (1948); *Fashion Originators' Guild of America, Inc. v. FTC*, 312 U.S. 457, 463-64 & n.4 (1941); *Realcomp II, Ltd. v. FTC*, 635 F.3d 815, 824 (6th Cir. 2011); *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 32 (D.C. Cir. 2005).

Section 1 of the Sherman Act prohibits "[e]very contract, combination or conspiracy, in restraint of trade or commerce among the several States." 15 U.S.C. § 1. Despite its broad language, the ban on contracts in restraint of trade extends only to unreasonable restraints of trade, *i.e.*, restraints that impair competition. *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997). Thus, a violation of Section 1 requires proof of two elements: "(1) a contract, combination, or conspiracy; (2) that imposed an unreasonable restraint of trade." *Valuepest.com of Charlotte, Inc. v. Bayer Corp.*, 561 F.3d 282, 286 (4th Cir. 2009) (quoting *Dickson v. Microsoft Corp.*, 309 F.3d 193, 202 (4th Cir. 2002)).

The first element requires proof of some kind of agreement because "[independent action is not proscribed." *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761 (1984). To demonstrate an agreement, a plaintiff must show that the parties "had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Id.* at 768. This may be proved through "direct or circumstantial evidence." *Id.* In addition, the

agreement must "deprive[] the marketplace of independent centers of decisionmaking" in order to raise Section 1 concerns. *American Needle, Inc. v. NFL*, 130 S. Ct. 2201, 2212 (2010) (quoting *Copperweld Corp v. Independence Tube Corp.*, 467 U.S. 752, 769 (1984)).

With respect to the second element, the Supreme Court has explained that "a restraint may be adjudged unreasonable either because it fits within a class of restraints that has been held to be 'per se' unreasonable, or because it violates what has come to be known as the 'Rule of Reason.'" *Indiana Federation of Dentists*, 476 U.S. at 457-58. Under per se analysis, "certain agreements or practices are so 'plainly anticompetitive,' and so often 'lack any redeeming virtue,' that they are conclusively presumed illegal without further examination." *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 8 (1979) (citations omitted). "A court need not then inquire whether the restraint's authors actually possess the power to inflict public injury ., nor will the court accept argument that the restraint in the circumstances is justified by any procompetitive purpose or effect." *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1362 (5th Cir. 1980) (citations omitted).

Complaint Counsel does not contend that the challenged conduct of the Board is unreasonable per se and instead challenges the Board's conduct under the rule of reason. When evaluating conduct under the rule of reason, the Supreme Court has called for "an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint," with the aim of reaching "a confident conclusion about the

principal tendency of a restriction." *California Dental*, 526 U.S. at 781.

In *Indiana Federation of Dentists*, the Court outlined three alternative modes of analysis under the rule of reason. That case concerned a group of dentists who agreed to withhold x-rays from dental insurance companies that requested their use in benefits determination. The Court applied a rule of reason analysis and affirmed the Commission's finding that the practice violated Section 1 of the Sherman Act. In applying the rule of reason, the Court condemned the practice on two alternative grounds and endorsed the existence of a third possible route to condemnation under the rule of reason (albeit one not applicable to the facts it confronted).

First, the Court held that it was faced with a type of restraint that, by its very nature, required justification even in the absence of a showing of market power. 476 U.S. at 459-60. According to the Court, because the practice was "a horizontal agreement among the participating dentists to withhold from their customers a particular service that they desire," then "no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement." *Id.* at 459 (quoting *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978)). Accordingly, the practice "require[d] some competitive justification even in the absence of a detailed market analysis." *Id.* at 460 (quoting *NCAA v. Board of Regents*, 468 U.S. 85, 109-10 (1984)). We have previously condemned several types of restraints under this "inherently suspect" form of

analysis.[10] *See, e.g., Realcomp II, Ltd.*, No. 9320, 2009 FTC LEXIS 250 (2009), *aff'd on other grounds, Realcomp II, Ltd. v. FTC*, 635 F.3d 815 (6th Cir. 2011); *North Texas Specialty Physicians*, 140 F.T.C. 715 (2005), *aff'd, North Texas Specialty Physicians v. FTC*, 528 F.3d 346 (5th Cir. 2008); *Polygram Holding, Inc.*, 136 F.T.C. 310 (2003), *aff'd, Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 32 (D.C. Cir. 2005).

Second, the Court held that even if the restriction in question was "not sufficiently 'naked' to call this principle into play, the Commission's failure to engage in detailed market analysis [was] not fatal to its finding of a violation of the Rule of Reason," because the record contained direct evidence of anticompetitive effects. 476 U.S. at 460. The Court reasoned that "[s]ince the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, 'proof of actual detrimental effects, such as a reduction of output,' can obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects.'" *Id.* at 460-61 (quoting 7 Areeda, *Antitrust Law* ¶ 1511, at 429 (1986)); *see also Realcomp*, 635 F.3d at 827 ("If adverse effects are clear, inquiry into market power is unnecessary.").

Third, the Court's discussion of the "proof of actual detrimental effects" prong of the analysis made clear that the traditional mode of analysis —

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[10] Antitrust tribunals have used a variety of terms to address this approach, including "abbreviated," "truncated," or "quick look" analysis. *See California Dental*, 526 U.S. at 770-71 (collecting cases). For simplicity, we adhere to the "inherently suspect" terminology we used in *Polygram*.

inquiring into market definition and market power — was still available, although not applicable to the case before it because the Commission had not attempted to prove market power. Although the Court did not explore this mode of analysis in detail, it observed that "the purpose of the inquiries into market definition and market power is to determine whether an arrangement *has the potential* for genuine adverse effects on competition." *Id.* at 460 (emphasis added). Numerous lower courts have confirmed that the Court's conclusion in *Indiana Federation of Dentists* that market power is "a surrogate for detrimental effects" logically compels the result that, if the tribunal finds that the defendants had market power and that their conduct tended to reduce competition, it is unnecessary to demonstrate directly that their practices had adverse effects on competition. *See, e.g., Realcomp*, 635 F.3d at 827-31; *United States v. Brown University*, 5 F.3d 658, 668-69 (3d Cir. 1993); *Flegel v. Christian Hospital*, 4 F.3d 682, 688 (8th Cir. 1993); *Gordon v. Lewistown Hospital*, 423 F.3d 184, 210 (3d Cir. 2005); *Law v. NCAA*, 134 F.3d 1010, 1019 (10th Cir. 1998); *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 937 (7th Cir. 2000).

The Supreme Court addressed the role of abbreviated rule of reason analysis again in *California Dental*. That case concerned a professional association's ethical canon that effectively prohibited members from advertising price discounts in most cases and entirely precluded advertising regarding the quality of services. The FTC and the Ninth Circuit had concluded that the restrictions resulting from this rule were tantamount to naked restrictions on price competition and output,

526 U.S. at 762-64, and therefore applied an "abbreviated, or 'quick look,' rule of reason analysis," and found them unlawful without a "full-blown rule of reason inquiry" or an "elaborate industry analysis." *Id.* at 763 (citing *NCAA*, 468 U.S. at 109-10 & n.39).

The Supreme Court agreed that restrictions with obvious anticompetitive effects, such as those in *Professional Engineers*, *NCAA*, and *Indiana Federation of Dentists*, do not require a "detailed market analysis" and may be held unlawful under a rule of reason framework unless the defendants proffer some acceptable "competitive justification" for the practice. Such analysis is appropriate if "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." *California Dental*, 526 U.S. at 769, 770. The Court found, however, that the particular advertising rules under review in that case might plausibly "have a procompetitive effect by preventing misleading or false claims that distort the market," particularly given the "disparities between the information available to the professional and the patient" and the "inherent asymmetry of knowledge" about the service. *Id.* at 771-72, 778 (quotation omitted). Thus, while "it is also possible that the restrictions might in the final analysis be anticompetitive[,] [t]he obvious anticompetitive effect that triggers abbreviated analysis has not been shown" *Id.* at 778

While the Court accordingly called, in that case, for a "more sedulous" market analysis, *id.* at 781, it took pains to add that its ruling did "not, of course, necessarily call for the fullest market

analysis. [I]t does not follow that every case attacking a less obviously anticompetitive restraint (like this one) is a candidate for plenary market examination." *Id.* at 779. Rather, the Court stated, "[w]hat is required is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint." *Id.* at 781.

In this Opinion, we analyze Respondent's conduct under the three modes of analysis endorsed in *Indiana Federation of Dentists.* It is important to note, however, that we could have selected just one of these modes of analysis and, if this approach had supported a finding that the Board's conduct is unlawful, it would have been unnecessary to engage in any further analysis. The fact that all three modes of inquiry under *Indiana Federation of Dentists* lead to the same result reinforces our conclusion that the conduct at issue is anticompetitive.

VI. ANALYSIS

A. CONCERTED ACTION

The ALJ concluded that "the Board had a common scheme or design, and therefore an agreement, to prevent or eliminate non-dentist teeth whitening services in North Carolina." (ID at 77-79.) The ALJ concluded that this agreement could be inferred from the Board's course of conduct in issuing cease and desist letters and other communications designed to discourage non-dentist teeth whitening. (ID at 78-79.) In addition, the ALJ concluded that even though the Board was a single legal entity, it was legally capable of concerted action because it was controlled by dentists with competing economic interests. (ID at 71-76.)

Respondent argues that the concerted action required by Section 1 of the Sherman Act has not been shown because the Board's members are not separate economic actors capable of a conspiracy. Respondent further argues that there is no evidence that members of the Board in fact engaged in concerted action. We find both of these arguments to be without merit.

Section 1 of the Sherman Act requires a "contract, combination or conspiracy" that unreasonably restrains trade. 15 U.S.C. § 1. "Independent action is not proscribed." *Monsanto Co. v. Spray-Rite Service Co.*, 465 U.S. 752, 761 (1984); *see also Copperweld*, 467 U.S. at 767-68 ("Section 1 does not reach conduct that is wholly unilateral" (quotation omitted)); *Virginia Vermiculite, Ltd. v. Historic Green Springs, Inc.*, 307 F.3d 277, 280 (4th Cir. 2002) ("It is incontestable that 'concerted action' in restraint of trade lies at the heart of a Sherman Act section 1 violation.").

In its recent *American Needle* decision, the Supreme Court explained that "concerted action under § 1 does not turn simply on whether the parties involved are legally distinct entities." *American Needle, Inc. v. NFL*, 130 S. Ct. 2201, 2209 (2010); *see also id.* at 2211 ("the question is not whether the defendant is a legally single entity or has a single name"). Instead, the "relevant inquiry is whether there is a 'contract, combination or conspiracy' amongst separate economic actors pursuing separate economic interests, such that the agreement deprives the marketplace of independent centers of decisionmaking, and therefore of diversity of

entrepreneurial interests, and thus of actual or potential competition." *Id.* at 2212 (quotations and citations omitted).

For example, a parent corporation and its wholly-owned subsidiary "are incapable of conspiring with each other for purposes of § 1 of the Sherman Act." *Copperweld*, 467 U.S. at 777. Although a parent corporation and its wholly-owned subsidiary are legally separate entities, they lack "independent centers of decisionmaking" necessary to raise Section 1 concerns. *Id.* at 769. Likewise, "an internal agreement to implement a single, unitary firm's policies does not raise the antitrust dangers that § 1 was designed to police." *Id.* Nevertheless, the Court has "repeatedly found instances in which members of a legally single entity violated § 1 when the entity was controlled by a group of competitors and served, in essence, as a vehicle for ongoing concerted activity." *American Needle*, 130 S. Ct. at 2209 (listing cases).

The Fourth Circuit has similarly recognized that corporate agents are capable of a Section 1 conspiracy when they have independent personal stakes in the object of the conspiracy. *See American Chiropractic v. Trigon Healthcare*, 367 F.3d 212, 224 (4th Cir. 2004) ("We have continued to recognize the independent personal stake exception."); *Greenville Publishing Co. v. Daily Reflector, Inc.*, 496 F.2d 391, 399-400 (4th Cir. 1974) (corporation found capable of conspiring with president of corporation because the officer had "an independent personal stake in achieving the corporation's illegal objective"). The "personal stake" principle is relevant only where the officers with the independent interests exercise some

degree of control over the firm's decisionmaking process. *See Oksanen v. Page Memorial Hospital*, 945 F.2d 696, 705 (4th Cir. 1991) (en bang) ("If the officer cannot cause a restraint to be imposed and his firm would have taken the action anyway, then any independent interest is largely irrelevant to antitrust analysis.").

In the instant case, the ALJ correctly found that Board members were capable of conspiring because they are actual or potential competitors. As required by Section 90-22(b) of the Dental Practice Act, dentist Board members continued to operate separate dental practices while serving on the Board (IDF 6-8), giving them distinct and potentially competing economic interests. *Cf. American Needle*, 130 S. Ct. at 2213 (NFL teams are "potentially competing suppliers"). At oral argument, Respondent appeared to acknowledge that members of the Board are potential competitors. (Oral Argument Tr. 9-10 ("they are potential competitors").)

In addition, Board members had a personal financial interest in excluding non-dentist teeth whitening services. *Id.* at 2215 ("Agreements made within a firm can constitute concerted action covered by § 1 when the parties to the agreement act on interests separate from those of the firm itself. "). At least eight of the ten dentist Board members serving from 2005 to 2010 (Drs. Allen, Burnham, Feingold, Hardesty, Holland, Morgan, Owens, and Wester) provided teeth whitening services in their private practices. (IDF at 6-9; *see also* IDF 32 (identifying Board members).) For example, during their tenures on the Board, one Board member earned over $75,000 from teeth whitening services,

while another earned over $40,000.[11] (IDF 10-11, 32.) The dentist members of the Board therefore stood to benefit financially from the challenged restrictions. (Baumer, Tr. 1856; *see also* IDF 102 (noting growth in dentist-provided teeth whitening).) In addition, all dentist Board members were elected to the Board by other licensed dentists, many of whom also have a financial interest in limiting the practice of teeth whitening to dentists. (IDF 15-23.) Thus, as the ALJ concluded, "Board members have a significant, nontrivial financial interest in the business of their profession, including teeth whitening." (IDF 12.)

Respondent's economic expert acknowledged that Board members have a financial interest in the challenged restrictions.[12] Respondent's economist

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[11] Respondent asserts that Findings 9, 10, 11, 104, and 233 exaggerate the financial interest of the Board and other dentists in teeth whitening by including income from forms of teeth whitening services outside the ALJ's relevant market. (RAB at 11-15.) In light of our conclusion that the relevant market is broader than that found by the ALJ (*see* Section VI.B.2.a, *infra*), Respondent's objections to these findings are moot. Respondent also objects to a citation to Dr. Baumer's testimony in Finding 12 but not the finding itself. (RAB at 15-16.) Even without the disputed citation, we would affirm Finding 12 based on the other evidence cited by the ALJ.

[12] The following exchange with Respondent's economist, Dr. Baumer, occurred at page 1856 of the trial transcript:

> Q. Now .. you believe that the board, the North Carolina State Board of Dental Examiners, is concerned about the financial interest of dentists in North Carolina; correct?
>
> A. Yes. I think they are.
>
> Q. And you believe that dentists in North Carolina do have a financial interest in

testified that state regulatory boards can be, and have been, used to exclude competition and augment the income of licensed practitioners. (Baumer, Tr. 1763 (referring to CX822 at 19), 1848-50, 1855-56, 1884, 1896-98, 1901-03, 1911-13, 1915; RX078 at 8.) He also acknowledged that the Board's decision to ban non-dentist teeth whitening may have been "influenced by the impact on the bottom line." (Baumer, Tr. 1859-62; *see also* Baumer, Tr. 1781 (similar).)

Our finding that Board members have a capacity to conspire is buttressed by the significant degree of control exercised by dentist members of the Board with respect to the challenged restraints. A majority of the members of the Board had a personal financial interest in excluding non-dentist teeth whitening. (IDF 2, 6-11.) Furthermore, all of the key decisionmakers in teeth whitening matters had a personal stake in the conspiracy because dentists were the only Board members involved in teeth whitening investigations (the consumer and dental hygienist Board members were excluded). (IDF 40, 59-60, 184, 192-93.)

Respondent nevertheless argues that dentist board members lack a financial interest in the challenged restraints because there is not a "significant degree" of competition between dentist-provided teeth whitening and non-dentist provided

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excluding non-dentist teeth whitening; correct?

A. There is a financial aspect to that. Correct.

Q. And that they have a financial interest in excluding the non-dentist teeth whiteners; correct?

A. Yes.

teeth whitening. (RRB at 3-4.) This assertion is contradicted not only by the testimony of Respondent's own economic expert, who stated that there is a high cross-elasticity between these two forms of teeth whitening (Baumer, Tr. 1842-45), but also by Respondent's acknowledgement that these two services are in the same relevant market (RAB at 10-11, 27; *see also* Baumer, Tr. 1711; *cf.* Kwoka, Tr. 994-1002 (testimony of Complaint Counsel's expert)).

Thus, despite the general principle that joint action by corporate officers is usually "not the sort of 'combination' that § 1 is intended to cover," *American Needle*, 130 S. Ct. at 2212, here the evidence shows that the dentist members of the Board were separate economic actors pursuing separate economic interests whose joint decisions could deprive the marketplace of actual or potential competition. Because their agreement joined together "independent centers of decisionmaking" *id.* at 2209, 2211, 2212, 2213, 2214 (quoting *Copperweld*, 467 U.S. at 769), the Board members were capable of conspiring under Section 1.

In a similar case, the board of directors of a nationwide moving company adopted a policy restricting its local affiliates' ability to offer interstate carriage. The Court of Appeals for the D.C. Circuit concluded that the directors had formed a Section 1 conspiracy because nine of the eleven board members were "actual or potential competitors" and stood to personally benefit from the challenged restriction. *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 215 (D.C. Cir. 1986).

Our conclusion is also consistent with our disposition of the *Massachusetts Board* case. That

matter involved a challenge to a state agency's restrictions on the use of truthful advertising by its optometrist licensees. We concluded that the members of the optometry board were separate legal entities capable of conspiring in restraint of trade because each optometrist on the board was engaged in the private practice of optometry and stood to benefit from the restraints in question. *See Massachusetts Board of Registration in Optometry*, 110 F.T.C. 549, 610-11 (1988).

We turn next to the issue of whether the element of concerted action has been satisfied. *See Oksanen*, 945 F.2d at 706 (even if there is a "capacity to conspire," a court must determine whether a conspiracy actually exists).

A plaintiff alleging conspiracy must demonstrate that the parties "had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto*, 465 U.S. at 768; *Thompson Everett, Inc. v. National Cable Advertising, L.P.*, 57 F.3d 1317, 1324 (4th Cir. 1995) (same). *Monsanto* requires "something more" than independent action, and must rise to the level of "a unity of purpose or a common design and understanding, or a meeting of minds." *Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc.*, 878 F.2d 801, 805 (4th Cir. 1989).

A plaintiff may demonstrate an agreement by "direct or circumstantial evidence." *Monsanto*, 465 U.S. at 768; *see also American Chiropractic*, 367 F.3d at 225-26 ("A plaintiff can offer direct or circumstantial evidence to prove concerted action."); *Laurel Sand & Gravel, Inc. v. CSX Transp., Inc.*, 924 F.2d 539, 542 (4th Cir. 1991) ("An agreement to

restrain trade may be inferred from other conduct."). But care must be taken with respect to inferences drawn from circumstantial evidence because "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986). For example, "mere contacts and communications, or the mere opportunity to conspire is insufficient evidence from which to infer an antitrust conspiracy." *Oksanen*, 945 F.2d at 706 (quoting *Cooper v. Forsyth County Hospital Authority*, 789 F.2d 278, 281 (4th Cir. 1986)).

The concerted action requirement can be satisfied even where one or more of the co-conspirators had differing motives or goals or "acted unwillingly, reluctantly, or only in response to coercion"; it is sufficient to show that the co-conspirators "acquiesced in an illegal scheme." *Dickson*, 309 F.3d at 205 (quotation and citation omitted); *see also Virginia Vermiculite*, 156 F.3d at 541 ("[I]t is not necessary that HGSI have shared Grace's alleged anticompetitive motive in entering into a proscribed restraint; it is sufficient that HGSI, regardless of its own motive, merely acquiesced in the restraint with the knowledge that it would have anticompetitive effects."); *Duplan Corp. v. Deering Milliken Inc.*, 594 F.2d 979, 982 (4th Cir. 1979) ("Where, as here, the [defendants] were knowing participants in a scheme whose effect was to restrain trade, the fact that their motives were different from or even in conflict with those of the other conspirators is immaterial.").

Here, there is direct evidence demonstrating that the dentist members of the Board had a common plan

to exclude non-dentist teeth whitening providers from the market. On several occasions, the Board discussed teeth whitening services provided by non-dentists and then voted to take action to restrict these services. (IDF 264, 276, 289, 317, 318, 321.) For example:

- At the Board's February 2007 meeting, the Board discussed the increase in complaints involving spas offering teeth whitening procedures and voted to send a letter to the cosmetology board with the goal of discouraging this practice. (IDF 317-18, 321, 323.) The Board's then-Secretary and Treasurer testified that there was "consensus" on the Board to send the letter and that "nobody had any objections." (CX565 at 62 (Hardesty Dep. at 240).)
- At its August 2007 Board meeting, the Board directed its staff to send letters to two teeth whitening manufacturers with the intention of discouraging or preventing the companies from providing products and equipment to non-dentist teeth whitening service providers in North Carolina. (IDF 264, 276, 286.)
- In late 2007 the Board unanimously voted to send letters to mall operators to dissuade them from leasing space to non-dentist teeth whiteners. (IDF 289, 292.)

There is also a wealth of circumstantial evidence tending to show that the members of the Board had a common scheme to exclude non-dentist teeth whiteners. In particular, members of the Board engaged in a consistent practice of discouraging non-dentist teeth whitening services by sending dozens of cease and desist letters and other communications to

providers of these services (IDF 207-45), manufacturers and distributors (IDF 261-80), mall owners and operators (IDF 288-93), the cosmetology board (IDF 317-22), and potential entrants (IDF 284). These communications were similar, regardless of the recipient (IDF 208-26, 262, 288, 320), and they had a common objective of discouraging non-dentist teeth whitening (IDF 234-45, 286-87, 293, 323). These cease and desist letters were on Board letterhead, indicated that the directives came from the Board, and stated that responses should be directed to the Board. (IDF 219 (listing exhibits).) Respondent acknowledged that the Board's case officers, all of whom were dentist Board members (IDF 184), were acting within their delegated authority when they sent the cease and desist letters. (Oral Argument Tr. 11-12.) The Board never took any steps to repudiate the actions of its case officers.

We agree with the ALJ that the consistency and frequency of the Board's message regarding non-dentist teeth whitening, over the course of several years and across the tenures of varying Board members (IDF 32), constitute probative circumstantial evidence of an agreement among Board members. (ID at 78.) We also find significant that on at least three occasions, members of the Board or Board counsel informed third parties that the Board was taking action against non-dentist teeth whitening kiosks. (IDF 201, 205; CX254 at 1; *see also* CX369 (noting that the Board had a "strategy" for addressing teeth whitening kiosks).) For example, after receiving an inquiry from a dentist about a teeth whitening kiosk in 2008, the Board's Chief Operations Officer responded that "we are currently going forth to do battle" with "bleaching

kiosks" and that "[w]e've sent out numerous cease and desist orders throughout the state." (IDF 201; CX404 at 1-2.)

Respondent argues that the Board's use of multiple case officers and case-specific recommendations when investigating teeth whitening complaints demonstrates that Board members were acting independently when they sent the cease and desist letters. (RAB at 26.) To the contrary, the fact that multiple agents of the Board delivered a consistent message over a period of several years to numerous and various types of third parties with no repudiation by the Board tends to negate the possibility that they were acting independently and reinforces our conclusion that the Board's representatives were acting pursuant to the Board's agreement and plan to exclude non-dentist teeth whiteners.

B. RESTRAINT OF TRADE

In this Section, we review the challenged conduct of the Board under the rule of reason using the three alternative modes of analysis described in *Indiana Federation of Dentists*. We find that the inherently suspect nature of the conduct, the indirect evidence, and the direct evidence all indicate that the Board's concerted action is anticompetitive. We also find that Respondent has failed to advance a legitimate procompetitive justification for its conduct.

1. The Board's Conduct under *Polygram*'s "Inherently Suspect" Framework

As discussed in Section V above, "not all trade restraints require the same degree of fact-gathering and analysis." *Polygram*, 136 F.T.C. at 327 (citing *Standard Oil Co. v. United States*, 221 U.S. 1, 65

(1911)); *see also California Dental*, 526 U.S. at 781 ("What is required is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint"). Thus, in *Polygram*, we held that in a limited category of cases — when "the conduct at issue is inherently suspect owing to its likely tendency to suppress competition" — our "scrutiny of the restraint itself. without consideration of market power" is sufficient to condemn the restraint, unless the defendant can articulate a legitimate justification for that restraint. 136 F.T.C. at 344; *see also Oksanen*, 945 F.2d at 709 ("a detailed inquiry into a firm's market power is not essential when the anticompetitive effects of its practices are obvious"); *North Texas Specialty Physicians*, 528 F.3d at 362 (physicians group's collective negotiations of fee-for-service contracts "bear a very close resemblance to horizontal price fixing" such that inherently suspect analysis was appropriate); *Realcomp*, 2009 FTC LEXIS 250, at *55-73 (finding that restrictions imposed by real estate multiple listings service were inherently suspect because they "were, in essence, an agreement among horizontal competitors to restrict the availability of information" to consumers and that restricted "the ability of low-cost, limited service" rivals to compete).

a. The Board's Conduct is Inherently Suspect

Applying *Polygram*'s "inherently suspect" framework, we conclude that the challenged conduct of the Board can reasonably be characterized as "giv[ing] rise to an intuitively obvious inference of anticompetitive effect." *California Dental*, 526 U.S. at 781; *see also Continental Airlines, Inc. v. United Airlines, Inc.*, 277 F.3d 499, 509 (4th Cir. 2002) ("the

anticompetitive impact... is clear from a quick look"). Both accepted economic theory and past judicial experience with analogous conduct support our finding that "the experience of the market has been so clear about the principal tendency" of this conduct so as to enable us to draw "a confident conclusion" that — absent any legitimate justification advanced by Respondent — competition and consumers are harmed by the Board's challenged practices. *California Dental*, 526 U.S. at 781.

The challenged conduct is, at its core, concerted action excluding a lower-cost and popular group of competitors. The Board not only foreclosed non-dentist providers from access to equipment suppliers and customers, but also directly excluded these providers from the market by sending them cease and desist letters.

Teeth whitening is one of the most popular cosmetic dentistry procedures, resulting in significant income to North Carolina dentists, including those on the Board. (IDF 9-12, 104, 233.) In response to the popularity of teeth whitening, non-dentists began offering teeth whitening services in North Carolina at mall kiosks and other locations. (IDF 137-38.) These providers charged significantly less than dentists despite achieving similar results. (IDF 117, 147, 150.)

Dentists soon began complaining to the Board about the lower prices offered by non-dentists for teeth whitening services. (IDF 194-96, 232.) Members of the Board likewise recognized that proliferation of non-dentist teeth whitening operations would adversely affect the income of dentists. (IDF 159-61.)

In response to the complaints, the Board issued dozens of cease and desist letters to non-dentist teeth whitening service providers and distributors of teeth whitening equipment. (IDF 208-09, 216-18, 230, 262-83.) Some of the letters stated that the sale or use of non-dentist teeth whitening products constituted a misdemeanor. (IDF 265-66, 280.) The Board viewed these letters as having the force of law and recipients of these communications had a similar understanding. (IDF 240-46.) In addition, the Board warned potential entrants not to offer teeth whitening services unless supervised by a dentist (IDF 284-85), sent letters to mall owners and operators urging them not to lease space to non-dentist teeth whitening providers (IDF 97, 288-93), and enlisted the assistance of the cosmetology board to warn its licensees that providing teeth whitening services could be a misdemeanor. (IDF 314-23.) The goal and effect of sending these letters and other communications was to stop non-dentists from providing teeth whitening services. (IDF 234-57, 286-87.)

No advanced degree in economics is needed to recognize that exclusion of products from the marketplace that are desired by consumers is likely to harm competition and consumers, absent a compelling justification. Users of the excluded product are made worse off because they must either shift to other, less desirable types of products, or forgo making a purchase entirely. (Kwoka, Tr. 1008-13, 1016; Baumer, Tr. 1720-21, 1724; CX822 at 10.) Consumers of similar non-excluded products are also likely to be harmed because suppliers of those products will face less competition and therefore have a greater ability to raise prices or reduce service.

(Kwoka, Tr. 1013-17; Baumer, Tr. 1700, 1763, 1781; CX822 at 10-11.) Excluding a rival product from the marketplace not only eliminates current competition from those providers, but also eliminates prospective competition from future entrants. (Kwoka, Tr. 1017-18; CX822 at 12.) These future competitors could offer additional sources of supply for the product, as well as new product innovations. (Kwoka, Tr. 1011, 1017-18.)

Respondent's economic expert acknowledged that the challenged conduct would tend to restrict supply and cause higher prices. (Baumer, Tr. 1700, 1719-21, 1724, 1726-27 (referring to CX822 at 13), 1763, 1781, 1839-41.) He testified on several occasions that this conclusion was a matter of "Econ 101," meaning that it required no more than a rudimentary level of economic analysis. (Baumer, Tr. 1721, 1724, 1763, 1781, 1840.) He explained that product exclusion would harm competition and consumers in terms of both price and choice.[13] (Baumer, Tr. 1841.)

Agreements to exclude an entire class of competitors from the marketplace by foreclosing access to suppliers, customers, or the market itself have long been treated as per se illegal or

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[13] Dr. Baumer qualified this testimony by noting that consumers might not be harmed by higher prices and fewer competitive options if they "felt like the market was safer" and, as a result, increased their consumption of the remaining products in the market. (Baumer, Tr. 1724; *see also id.* at 1727.) However, Dr. Baumer did not offer an opinion, and Respondent has not identified any evidence, that (a) safety concerns currently inhibit some consumers from whitening their teeth or (b) that prohibiting non-dentist teeth whitening would lead to the perception that teeth whitening is a safer practice, thereby increasing overall demand for teeth whitening products.

presumptively illegal under the antitrust laws. In these cases, the methods of exclusion have varied but the holdings are consistent in condemning such conduct with little, if any, consideration of any purported defenses.

In *Fashion Originators' Guild of America, Inc. v. FTC*, 312 U.S. 457 (1941), manufacturers of women's garments, working through an industry association, boycotted retailers that sold copies of their original designs. The Supreme Court affirmed the FTC's conclusion that this scheme was an unfair method of competition, notwithstanding the organization's claim that the copying of garment designs was a tortious act. The Court explained that the association's policy "has both as its necessary tendency and as its purpose and effect the direct suppression of competition." *Id.* at 465. The Court was particularly concerned that the scheme, if successful, would have eliminated an entire class of competitors – as the Court called it, a "rival method of competition" – from the marketplace. *Id.* at 467. The Court concluded that the manufacturers' prevention-of-torts defense was not cognizable under the antitrust laws: "even if copying were an acknowledged tort under the law of every state, that situation would not justify petitioners in combining together to regulate and restrain interstate commerce in violation of federal law." *Id.* at 468.

The Supreme Court addressed exclusion of a class of competitors again in *United States v. General* Motors Corp., 384 U.S. 127 (1966). In that case, a group of Chevrolet automobile dealers successfully pressured *General Motors* not to sell to dealers that resold their inventory through discounters. The

conspiring dealers then established a monitoring venture to ensure compliance. The Court found that the "[e]xclusion of traders from the market by means of combination or conspiracy is inconsistent with the free-market principles embodied in the Sherman Act" and per se illegal. *Id.* at 146. The Court was especially troubled that one of the purposes of the concerted effort "was to protect franchised dealers from real or apparent price competition." *Id.* at 147. Consistent with the *Fashion Originators' Guild* case, the Court declined to consider the parties' asserted justification — in this case, that sales to discounters violated the dealers' franchise agreements. *Id.* at 139-40.

The Supreme Court has likewise held that agreements to exclude a single competitor are per se illegal or presumptively illegal. For example, in *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961), a manufacturer alleged that an industry association refused to grant a "seal of approval" to its ceramic gas burner because of the influence of competitors in the association. As a result of the association's action, the manufacturer's burner was "effectively excluded from the market." *Id.* at 658. The Court held that the plaintiff had alleged a per se illegal boycott because of its "monopolistic tendency," notwithstanding that the victim was limited to a single manufacturer. *Id.* at 660 (quoting *Klor's, Inc. v. Broadway-Hale Stores*, 359 U.S. 207, 213 (1959)).

Similarly, in *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982), the dominant fuel cutoff manufacturer used its influence in ASME, a standards organization, to

prevent the organization from approving a rival's alternative design. ASME's standards were so influential that, according to the Court, it was "in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce." *Id.* at 570 (quoting *Fashion Originators' Guild*, 312 U.S. at 465). The jury found ASME liable under Section 1, and the Court affirmed. While the issue before the Court was whether a standards organization could be liable for the acts of its agents, the Court nevertheless commented that the "anticompetitive practices of ASME's agents are repugnant to the antitrust laws." *Id.* at 574. Participants in standards organizations have "the power to frustrate competition in the marketplace [and] to harm their employers' competitors through manipulation of [the standards organization's] codes." *Id.* at 571.

In its most recent decision addressing competitor exclusion, the Court, citing to *Fashion Originators' Guild*, *General Motors*, and *Radiant Burners*, held that certain concerted refusals to deal or group boycotts remain per se violations of the Sherman Act. *See Northwest Wholesale Stationers v. Pacific Stationary & Printing Co.*, 472 U.S. 284, 290 (1985); *see also Oksanen*, 945 F.2d at 708 ("Certain forms of agreements, such as varieties of group boycotts, have been classified as per se violations."). Where competitors "cut off access to a supply, facility, or market necessary to enable the boycotted firm to compete," *Northwest Wholesale Stationers*, 472 U.S. at 294, the conduct may be conclusively presumed to be anticompetitive, at least when it does not "enhance overall efficiency and make markets more competitive." *Id.* In contrast, courts apply the rule of

reason to competitor exclusions if the restraints are imposed by a joint venture that lacks market power or exclusive access to an element essential to effective competition. *See id.* at 295-96.

Here, the challenged conduct consists of concerted action denying non-dentist teeth whiteners access to both suppliers and customers (by foreclosing access to retail space), as well as to the market itself. As such, the Board's conduct bears a close resemblance to conduct that the Supreme Court has condemned as per se illegal and that the Court continues to treat as conclusively anticompetitive under *Northwest Wholesale Stationers*. *Cf. North Texas Specialty Physicians*, 528 F.3d at 362 (inherently suspect analysis appropriate where restraints "bear a very close resemblance to horizontal price fixing"). Furthermore, as discussed below, this is not a case involving conduct plausibly designed to enhance competition for teeth whitening products or services.

Respondent contends that *Fashion Originators' Guild*, *General Motors*, *Radiant Burners*, *Hydrolevel*, and *Northwest Wholesale Stationers* are inapposite because they involved private organizations, such as professional associations, rather than state licensing boards. (RRB at 16-17.) We disagree. The competitive concern in both of these contexts is that an organization with the power to exclude is used to facilitate or enforce an anticompetitive agreement among private parties. If anything, state agencies, such as the Board, are likely to have greater ability to enforce restrictions than private organizations. The Court has noted the significant potential for competitive injury stemming from concerted conduct

among private parties enforced by state agencies. *See, e.g., Hydrolevel*, 456 U.S. at 570-74 (condemning an agreement among private actors that was enforced by state agencies); *Allied Tube & Conduit Corp. v. Indian Head*, 486 U.S. 492, 500 (1988) (an agreement to manipulate a vote of a standard setting organization whose codes were routinely adopted by state and local governments raises a "serious potential for anticompetitive harm").

Furthermore, as conceded by Respondent's economic expert, state licensing boards, including dental boards, have a history of enforcing restrictions designed to enhance the income of their licensees at the expense of consumers, even though members of these organizations had taken oaths to protect the public health.[14] (Baumer, Tr. 1847-54, 1855 ("self-interest definitely had an impact"), 1884, 1896-1901, 1912-17; CX826 at 11 ("The public lost at the expense of the professional.") (Baumer, Dep. at 36-37)). Some medical boards and other professional healthcare boards continue to engage in these anticompetitive practices. (Baumer, Tr. 1898, 1901-04, 1911-12; CX826 at 12, 36 (Baumer Dep. at 39, 136).) As a result, "when there's licensing taking place, my ears go up, [and] we look very carefully for evidence of anticompetitive behavior." (Baumer, Tr. 1897.) This testimony reinforces our conclusion that a more deferential standard should not be applied to

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[14] Respondent's expert acknowledged that some of these concerns are presented by this case. In particular, Dr. Baumer observed that the Board is concerned about the financial interests of North Carolina dentists and that those interests could have affected the Board's decision to exclude non-dentist teeth whitening providers. (Baumer, Tr. 1856-62.)

concerted activity enforced through a state agency controlled by financially interested actors than through a private body.

In sum, the challenged conduct — an agreement among competitors to exclude other competitors from the market by preventing their access to suppliers, customers, and the market itself — bears a close resemblance to conduct condemned by the Supreme Court as per se illegal. As conceded by Respondent's economic expert, such conduct has an obvious tendency to suppress competition, increase prices, and harm consumers of teeth whitening products and services. In particular, the restraints alleviate downward price pressure on dentists and eliminate an entire class of product desired by some consumers. We therefore conclude that the challenged conduct is inherently suspect under *Polygram* and thus presumptively unreasonable unless Respondent can produce a legitimate justification.

b. The Board's Proffered Justifications

Although the Board's actions had a clear tendency to suppress competition and harm consumers, the *Polygram* framework requires consideration of whether Respondent can overcome this presumption of unreasonableness by showing that the practice has "some countervailing procompetitive virtue." *Indiana Federation of Dentists*, 476 U.S. at 459; *see also Northwest Wholesale Stationers*, 472 U.S. at 294 (practices can be "justified by plausible arguments that they were intended to enhance overall efficiency and make markets more competitive"); *Continental Airlines*, 277 F.3d at 510 ("even when a court eschews a full rule-of-reason analysis and so forgoes detailed

examination of the relevant market, it must carefully consider a challenged restriction's possible procompetitive justifications").

A cognizable justification is ordinarily one that stems from measures that increase output or improve product quality, service, or innovation. *See Indiana Federation of Dentists*, 476 U.S. at 459 (procompetitive justifications include "creation of efficiencies in the operation of a market or the provision of goods and services"); *Broadcast Music*, 441 U.S. at 19-20 (courts should examine whether the practice will "increase economic efficiency and render markets more, rather than less, competitive" (quotation and citation omitted)); *Paladin Associates v. Montana Power Co.*, 328 F.3d 1145, 1157 (3d Cir. 2003) ("improving customer choice" and reducing costs are procompetitive justifications); *Polygram*, 136 F.T.C. at 345-46.

A plausible justification is one that "cannot be rejected without extensive factual inquiry." *Polygram*, 136 F.T.C. at 347. "The defendant, however, must do more than merely assert that its purported justification benefits consumers [rather,] it must articulate the specific link between the challenged restraint and the purported justification." *Id.*; *see also North Texas Specialty Physicians*, 528 F.3d at 368 ("some facial plausibility" of purported justification insufficient to rebut liability under abbreviated rule of reason analysis).

If a justification is not only cognizable but also plausible, then further examination of the restraint's effect on competition is warranted. Otherwise, "the case is at an end and the practices are condemned." *Polygram*, 136 F.T.C. at 345.

Respondent offers three justifications for its conduct, all of which were rejected by the ALJ.[15] Respondent's first asserted defense is that its actions were intended to promote public health and welfare. Respondent asserts that there are health and safety risks when teeth whitening is performed by a non-dentist and that the ALJ erred by not making any findings as to the safety of non-dentist teeth whitening. (RAB at 7-10, 39.) Similarly, Respondent urges that we recognize a defense, separate and apart from the state action defense, based on a state agency's enforcement of a state statute. (RAB at 29-34, 39.)

Courts have rejected social welfare and public safety concerns as cognizable justifications for restraints on competition. In *Professional Engineers*, the Supreme Court reviewed a trade association ethics rule that effectively prohibited engineers from engaging in competitive bidding. The association asserted as a defense that "awarding engineering contracts to the lowest bidder, regardless of quality, would be dangerous to public health, safety, and welfare." *Professional Engineers*, 435 U.S. at 685. The Court held that such a defense was not cognizable under the Sherman Act:

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[15] Respondent also asserts as a justification that its conduct constituted state action, an argument that the Commission rejected in its February 3, 2011 decision. *See North Carolina Dental*, 151 F.T.C. at 615-33. In the proceedings below, Respondent asserted that permitting non-dentists to perform teeth whitening could result in the production of an inferior service. The ALJ rejected that argument, explaining that such a claim was tantamount to an assertion that competition itself is harmful (*Id.* at 108-09), and Respondent does not contest the ALJ's resolution of that issue here.

> The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services. The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain – quality, service, safety, and durability – and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers The fact that engineers are often involved in large-scale projects significantly affecting the public safety does not alter our analysis. Exceptions to the Sherman Act for potentially dangerous goods and services would be tantamount to a repeal of the statute. In our complex economy, the number of items that may cause serious harm is almost endless

Id. at 695. The association's defense that competition would lead consumers to choose dangerous and inferior quality services was therefore rejected as a matter of law.

Similarly, in *Indiana Federation of Dentists*, the Court held that a health and safety defense was not available for an alleged Sherman Act violation in the dental field. In that case, a group of dentists agreed not to submit x-rays to insurers, asserting that "the provision of x-rays might lead the insurers to make inaccurate determinations of the proper level of care and thus injure the health of the insured patients." 476 U.S. at 452. Accepting this argument, according to the Court, would have been "nothing less than a frontal assault on the basic policy of the Sherman

Act." *Id.* at 463 (quoting *Professional Engineers*, 435 U.S. at 695). The Court explained that prevention of "unwise and even dangerous choices" was not a cognizable justification for collusion. *Id.* at 463.

In *Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia*, 624 F.2d 476 (4th Cir. 1980), two health plans controlled by physicians agreed not to pay for services rendered by clinical psychologists unless those services were billed through a physician. The Fourth Circuit, reversing the district court, found that the policy would reduce "consumer and provider alternatives" and increase costs. *Id.* at 486. The court rejected the health plan's argument that physician supervision of psychologists was necessary for optimum health outcomes, explaining that "we are not inclined to condone anticompetitive conduct upon an incantation of 'good medical practice.'" *Id.* at 485; *see also Wilk v. AMA*, 719 F.2d 207, 228 (7th Cir. 1983) ("[A] generalized concern for the health, safety and welfare of members of the public ., however genuine and well-informed such a concern may be, affords no legal justification for economic measures to diminish competition with [chiropractors] by [some medical doctors].")

Respondent contends that the preceding line of cases is distinguishable because the cases do not involve a state agency acting pursuant to a state statute. Respondent asserts that a valid defense to a Sherman Act claim exists where a state agency is "promoting the public health and enforcing state law," even where the requirements of the state action doctrine are not satisfied. (RAB at 32.) Although Respondent asserts that such a defense is consistent with a line of lower court cases allegedly justifying

conduct based on "public service or ethical norms" (RAB at 31-32), Respondent does not cite to any cases on point and we are aware of no authority for such a defense.

To the extent that Respondent's claims are premised on principles of federalism and a concern with state prerogatives, the Supreme Court has already defined the contours for such a defense. *See Parker v. Brown*, 317 U.S. 341 (1943). Almost 70 years ago, the Supreme Court created the state action defense for state or private actors acting pursuant to a state regulatory program. As we concluded in our February 3, 2011 decision, that defense requires a showing of both "clear articulation" and "active supervision" for state boards controlled by financially interested members, such as Respondent. *See North Carolina Dental*, 151 F.T.C. at 617-28. Respondent's proposal would substantially weaken these requirements. As we understand Respondent's position, it would only have to show "articulation" to make out a defense, rather than both "clear articulation" and "active supervision." Given that the Supreme Court has already established a defense for Sherman Act claims based on the actions of state officials and that Respondent's proposed "enforcement of state law" defense has the potential to seriously undermine the state action doctrine, we see no reason to recognize Respondent's proposed new defense.

To the extent that Respondent's defense is meant to invoke a competitive analysis, Respondent has failed to explain why the Board's status as a state agency changes the likely competitive impact of its conduct and therefore renders the relevant case law

rejecting health and safety defenses inapplicable. There is nothing in those decisions to suggest that they turned on this distinction. To the contrary, the Court rejected the notion of a health or safety defense because it was extraneous to an analysis of competitive effects, not because of the private nature of the actors. *See Professional Engineers*, 435 U.S. at 695; *Indiana Federation of Dentists*, 476 U.S. at 463.

Respondent's public safety defense fails for another reason: the challenged actions of the Board are not consistent with its enforcement mandates under the Dental Practice Act. The Complaint does not challenge the Board's enforcement of the Dental Practice Act against non-dentist teeth whiteners in the state courts, which is the only way the Board is authorized to enforce the Act (other than referring a case to a state prosecutor). *See* N.C. General Statutes § 90-40.1; IDF 43, 44, 190; Response to Complaint ¶ 19; RAB at 2-3; RRB at 5. Rather, this proceeding challenges actions, including sending cease and desist letters to non-dentists, that were not authorized by the Dental Practice Act. *See* N.C. General Statutes §§ 90-27, -29, -40, -40.1; IDF 45-49, 190.

Finally, even if a public safety defense were cognizable under *the* antitrust laws, we would find that Respondent had failed to introduce sufficient evidence to establish such a justification.[16] Although

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[16] Respondent asserts that because Complaint Counsel did not file an appeal from the ALJ's Initial Decision, under FTC Rule of Practice 3.52(b), 16 C.F.R. § 3.52(b), the Commission may not make any new factual findings or legal conclusions requested by Complaint Counsel. (RRB at 1, 9.) Rule 3.52(b) contains no such limitation; furthermore, under Rule 3.54, 16 C.F.R. § 3.54,

several Board members identified a number of theoretical risks from non-dentist teeth whitening, none was able to cite to any clinical or empirical evidence validating any of these concerns. (Response to RFA 21, 38, 39; *see also* Hardesty, Tr. 2818, 2829; CX565 at 38 (Hardesty Dep. at 145); CX554 at 26 (Allen Dep. at 95-96); CX555 at 16, 26 (Brown Dep. at 55-56, 97); Wester, Tr. 1313-15, 1402, 1405-06; CX560 at 65-66 (Feingold Dep. at 252-54); CX567 at 37 (Holland Dep. at 138-40); CX564 at 16 (Hall Dep. at 55-56); Owens, Tr. 1664.) Likewise, Respondent's expert witness, Dr. Haywood, testified that he was unaware of any scientific evidence demonstrating any consumer injury from non-dentist teeth whitening.[17] (Haywood, Tr. 2696, 2713-14, 2729; CX402 at 5 ("The effects on pulp have no clinical consequence other than immediate but transient sensitivity.")))

Respondent points to four alleged instances of possible consumer injury *caused* by non-dentist teeth whitening that were brought to the Board's attention.

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the Commission can conduct a *de novo* review of the entire record and make factual findings and conclusions of law to the same extent as the ALJ.

[17] Dr. Haywood's principal concern with non-dentist teeth whitening is that it may mask a pathology. (Haywood, Tr. 2950; CX823 at 20 (Haywood Dep. at 70)). However, as Dr. Giniger testified, it is highly unlikely that non-dental teeth bleaching would make a tooth so white as to make a pathology undetectable by a dentist or for a pathology not to present other symptoms such as swelling, purulence, pain, or redness. (Giniger, Tr. 301-20, 356, 437-38). Furthermore, there are no studies or case reports identifying an incident of masked pathology from any form of teeth bleaching (Giniger, Tr. 301-02, 319-20; Haywood, Tr. 2734-35, 2928-32), despite the tens of millions of instances of over-the-counter teeth whitening (CX585 at 9).

(RAB at 10.) However, we question whether four anecdotal reports of harm over a multi-year period based on products considered safe by the FDA (Giniger, Tr. 155, 250, 256) and used over a million times over the last twenty years (Giniger, Tr. 122, 257) could constitute adequate evidence of a potential health or safety risk. (Kwoka, Tr. 1078.) Compounding this concern is the lack of any investigation or medical documentation with respect to two of the four reports of injury. (RX17 at 1, 2.) In the third case, a dentist's examination revealed that the patient suffered from bone loss and infection unrelated to the teeth whitening procedure and that any discomfort from the teeth whitening procedure would be temporary and treatable. (CX575 at 15-24 (Hasson Dep. at 53-89).) The fourth reported case of harm is somewhat more compelling, but even in this case, the reported injuries do not appear to have been permanent and may have been caused by a preexisting pathology. (Runsick, Tr. 2136; Giniger, Tr. 274-77.)

The lack of contemporaneous evidence that the challenged conduct was motivated by health or safety concerns reinforces our rejection of Respondent's public safety defense on the merits. Respondent has not identified any evidence that the Board concluded prior to embarking on the challenged conduct that non-dentist teeth whitening was an unsafe practice. Indeed, Respondent was unable to point us to any such evidence at oral argument. (Oral Argument Tr. 17-19, 21-22, 33-34.) Moreover, the Board began issuing cease and desist letters two years before it received any reports of consumer injury. (*Compare* CX38 at 1 (first cease and desist letter, dated January 11, 2006), *with* CX476 at 1 (first complaint

claiming injury, dated February 20, 2008); *see also* Respondent's Proposed Finding of Fact 459 (acknowledging that the Board received the first complaint of injury "in or about 2008").) Indeed, with just two possible exceptions — the cease and desist letters to Port City Tanning and Lite Bright — none of the challenged conduct of the Board appears to have been motivated by even the pretext of specific health or safety concerns. (CX59 (cease and desist letter to Port City Tanning); RX21 at 3-7 (complaint of injury regarding Port City Tanning); CX388 (cease and desist letter to Lite Bright); RX17 at 1, 2 (complaints of injury regarding Lite Bright)).

In contrast, there was a wealth of evidence presented at trial suggesting that non-dentist provided teeth whitening is a safe cosmetic procedure. (Giniger, Tr. 121-24, 134-35, 145-47, 155-57, 212-30, 239-65, 354-56, 445-47, 453-55; Nelson, Tr. 771; Osborn, Tr. 664-65; Valentine, Tr. 547.) Despite the millions of teeth whitening procedures performed by non-dentists, Respondent points to no studies suggesting any health risks (other than transient sensitivity) from the procedure. (*Cf.* Giniger, Tr. 121-23, 147, 217-19, 257-58, 355-56, 453-55 (asserting that there are no studies indicating a health risk from non-dental teeth whitening).) Consequently, the record as a whole fails to substantiate Respondent's public safety claims.

Respondent's second defense is that its actions were intended to promote "legal competition." (RAB at 20, 31.) As an initial matter, however, North Carolina courts have never concluded that teeth whitening services provided by non-dentists are unlawful. (ID at 8, 109; Oral Argument Tr. 49.)

More significantly, the Supreme Court has repeatedly rejected this argument as a matter of antitrust doctrine. In *Indiana Federation of Dentists*, a group of dentists attempted to justify their withholding of x-rays from insurance companies by arguing that an insurance company's review of dental x-rays would constitute the unauthorized practice of dentistry under state law. The Court dismissed this argument: "That a particular practice may be unlawful is not, in itself, a sufficient justification for collusion among competitors to prevent it." 476 U.S. at 465. Likewise, in *Fashion Originators' Guild*, the Court held that even if the sale of the excluded products was tortious, "that situation would not justify petitioners in combining together to regulate and restrain interstate commerce in violation of federal law." 312 U.S. at 468. In both of these cases, the Court found it unnecessary to decide whether the excluded product or practice actually violated state law. Accordingly, we do not credit this defense.

Respondent's third defense is that it acted "in good faith." (RAB at 32.) This is not a valid defense under the antitrust laws. The Supreme Court has held that "good motives will not validate an otherwise anticompetitive practice." *NCAA*, 468 U.S. at 101 n.23; *see also United States v. Griffith*, 334 U.S. 100, 105-06 (1948) (practice may be condemned even if respondent "had no intent or purpose unreasonably to restrain trade"); *Associated Press v. United States*, 326 U.S. 1, 16 n.15 (1945) ("the Sherman Act cannot 'be evaded by good motives. The law cannot be set up against it in a supposed accommodation of its policy with the good intention of parties '" (quoting *Standard Sanitary Manufacturing Co. v. United States*, 226 U.S. 20, 49 (1912))); *Chicago*

Board of Trade v. United States, 246 U.S. 231, 238 (1918) (rejecting notion that "a good intention will save an otherwise objectionable regulation").

Accordingly, under *Polygram*'s "inherently suspect" framework, we conclude that the Board's conduct is unreasonable and violates both Section 1 of the Sherman Act and Section 5 of the FTC Act. We next consider whether a more elaborate rule of reason analysis, encompassing considerations of market power and effects, provides an alternative basis for our conclusion that the Board's conduct is anticompetitive.

2. The Board's Conduct under the Full Rule of Reason

In this section, we evaluate the Board's conduct under a more fulsome rule of reason analysis and again conclude that the Board's conduct violates the antitrust laws. As indicated in Section V, *supra*, a plaintiff can establish an affirmative case in either of two ways. It can do so indirectly by demonstrating the defendant's market power, which, when combined with the anticompetitive nature of the restraints, provides the necessary confidence to predict the likelihood of anticompetitive effects. Or, the plaintiff can provide direct evidence of "actual, sustained adverse effects on competition" in the relevant markets, which would be "legally sufficient to support a finding that the challenged restraint was unreasonable" — whether or not the plaintiff has made any showing regarding market power. *Indiana Federation of Dentists*, 476 U.S. at 461; *see also Realcomp*, 635 F.3d at 825 ("If [Respondent's] challenged policies are shown to have anticompetitive effect, or if [Respondent] is shown to have market

power and to have adopted policies *likely* to have an anticompetitive effect, then the burden shifts to [Respondent] to provide procompetitive justifications for the policies."); *Tops Markets, Inc. v. Quality Markets, Inc.*, 142 F.3d 90, 96 (2d Cir. 1998) (plaintiff has "two independent means by which to satisfy the adverse-effect requirement" — direct proof of "actual adverse effect on competition" or "indirectly by establishing sufficient market power to cause an adverse effect on competition"); *Law*, 134 F.3d 1019 ("plaintiff may establish anticompetitive effect indirectly by proving that the defendant possessed the requisite market power within a defined market or directly by showing actual anticompetitive effects"); *Brown University*, 5 F.3d at 668 (similar).

Under this full rule of reason analysis, we find support in the record for a conclusion that the Board's agreement is anticompetitive, which shifts the burden to Respondent to produce a legitimate countervailing justification in order to avoid condemnation. Since Respondent has failed to assert a legitimate, procompetitive justification, we conclude that the Board's concerted action violates Section 1 of the Sherman Act and Section 5 of the FTC Act.

a. The Board Possesses Market Power in the Market for Teeth Whitening Products and Services

At this stage of the proceeding, the parties do not dispute that the relevant market consists of four types of teeth whitening: dentist in-office services, dentist take-home kits, non-dentist service providers, and over-the-counter products.[18] (RAB at 10-11, 27;

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[18] In light of the parties' agreement on the relevant market, we have no need to consider whether same-day teeth whitening

CCAB at 32.) All four of these products perform the same function (teeth whitening) using a similar technique (application of a form of peroxide to the teeth). (IDF 106-50.) *See Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962) (the "boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it"); *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956); *Greenville Publishing Co. v. Daily Reflector, Inc.*, 496 F.2d 391, 399 (4th Cir. 1974) (a relevant market is defined by the scope of "reasonable interchangeability").

The record shows that market participants view themselves as offering comparable services, recognize that substantial price and non-price competition exists between them, and target their advertising toward consumers who may be considering using a different type of teeth whitening service. (IDF 157-69.) Respondent's economic expert testified that the four types of teeth whitening are differentiated products within an overall teeth whitening market. (Baumer, Tr. 1711.) He also testified that there is a high cross-elasticity among the four types of teeth whitening products. (Baumer, Tr. 1842-45.) Complaint Counsel's economic expert, while disclaiming an opinion on the relevant market, did not dispute Respondent's expert in this respect and further testified that "these alternative methods are in fact very much in competition with one another." (Kwoka, Tr. 997-1000.) The parties also agree that

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services (dentist in-office services and non-dentist providers) constitute an additional relevant market, as found by the ALJ. (*Id.* at 63-71.)

the relevant geographic market is North Carolina. (ID at 64.)

The ALJ concluded, and Respondent does not dispute,[19] that the Board has market power based on the Board's power to exclude competition. *See du Pont*, 351 U.S. at 391 ("Monopoly power is the power to control prices or exclude competition."); *Hydrolevel*, 456 U.S. at 570-71 (finding that standard setting organization had market power based on power to exclude). We agree.

The Board, as the agency with power to enforce the Dental Practice Act, has the authority to regulate and discipline dentists in North Carolina. *See* N.C. General Statutes §§ 90-30, -31, -34, -40, -40.1, -41,-42; *cf. Massachusetts Board of Optometry*, 110 F.T.C. at 588 (state optometry board possessed market power on account of its ability to regulate the business of optometry and "to impose sanctions on any optometrist who fails to obey its rules and regulations"). In addition, the Board was able to use its perceived authority to exclude non-dentists from providing teeth whitening services in North Carolina. (IDF 240-56, 324-27). Respondent's expert agreed, noting that the Board has "the power to exclude competition" (CX826 at 36 (Baumer Dep. at 136-37); *see also* Baumer, Tr. 1722 ("The board has the power

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[19] Respondent briefly contests the ALJ's finding of market power in its reply brief (RRB at 15) but failed to address this issue in its opening brief, thereby waiving the argument. Rule 3.52, 16 C.F.R. § 3.52 ("The Commission will not consider new arguments or matters raised in reply briefs that could have been raised earlier in the principal briefs."). As noted in the text, even absent a waiver, we would find that the Board had market power.

to exclude.")) and the power to impose entry barriers (Baumer, Tr. 1840).

b. Indirect Evidence of Anticompetitive Effects

The ALJ's uncontested finding of market power, coupled with our earlier determination that the challenged conduct would tend to suppress competition, provides "indirect" evidence that those policies have or likely will have anticompetitive effects. *See Craftsmen Limousine, Inc. v. Ford Motor Co.*, 491 F.3d 380, 388 (8th Cir. 2007); *Law*, 134 F.3d at 1019; *Tops Markets*, 142 F.3d at 96; *Levine v. Central Florida Medical Affiliates, Inc.*, 72 F.3d 1538, 1551 (11th Cir. 1996); *Brown University*, 5 F.3d at 669; *Realcomp*, 2009 FTC LEXIS 250, at *95. As the Sixth Circuit recently explained, "[m]arket power and the anticompetitive nature of the restraint are sufficient to show the potential for anticompetitive effects under a rule-of-reason analysis, and once this showing has been made, [Respondent] must offer procompetitive justifications." *Realcomp*, 635 F.3d at 827; *see also id.* at 827 n.6 (observing that "[o]ther circuits have permitted an inference of adverse effects based on a showing of market power and anticompetitive tendencies.").

In light of the Board's market power and the facially restrictive nature of the policies at issue, no additional analysis is required under the rule of reason to support our conclusion that the Board's restraints are unreasonable because they will predictably result in harm to competition.

c. Direct Evidence of Anticompetitive Effects

The ALJ found, and we agree, that the Board's concerted action resulted in the exclusion of non-dentist providers from the market and the prevention

of new entry by potential suppliers, both of which injured competition and consumers. (ID at 97-104.) This finding of actual anticompetitive effects — which Respondent does not dispute in its appeal to the Commission — is by itself sufficient to shift the burden to Respondent to produce a procompetitive justification. *See Realcomp*, 635 F.3d at 827 ("If adverse effects are clear, inquiry into market power is unnecessary."); *Law*, 134 F.3d at 1019 ("showing actual anticompetitive effects" satisfies plaintiff's initial burden); *Brown University*, 5 F.3d at 668 (plaintiff can meet its initial burden under the rule of reason "by proving the existence of actual anticompetitive effects, such as reduction of output, increase in price, or deterioration in quality of goods or services" (citation omitted)).

The undisputed evidence shows that, as a result of the Board's actions — including sending cease and desist letters to providers and manufacturers, sending letters to mall operators, and posting a warning on the cosmetology board's website — numerous non-dentist teeth whitening providers in North Carolina stopped offering teeth whitening services. (IDF 246-56, 324-27; *see also* IDF 284-85 (potential entrants discouraged from entering).) The Board's actions also cut off access to leading suppliers of teeth whitening products and retail space used by non-dentist providers. (IDF 70-72, 98, 267-70, 272, 277-83, 294-313.) Respondent's economic expert acknowledged that "[n]ot surprisingly, the actions of the State Board were effective and many kiosk and spa operator's] ceas[ed] their actions." (RX78 at 8; *see also* Baumer, Tr. 1720 ("we know that post-exclusion non-dentist teeth whitening is reduced"); Kwoka, Tr. 1136 ("the letters were effective").)

The parties' experts agreed that the Board's exclusion of non-dentist providers led to higher prices, although they disputed the extent of the price increase. (Kwoka, Tr. 1029-32 (there is "a substantial price effect"); Baumer, Tr. 1732 ("I can't disagree" with the claim that "there's a small impact" on price), 1815 (the Board's actions caused "maybe slightly higher prices"); RX140 at 11). In reaching these conclusions neither party's economic expert prepared a quantitative analysis of the price effects of the Board's restraints.

In light of the restraints' obvious disruption of the "proper functioning of the price-setting mechanism of the market," a precise quantification of the price increase was unnecessary. *Indiana Federation of Dentists*, 476 U.S. at 461-62; *see also United States v. Microsoft Corp.*, 253 F.3d 34, 79 (D.C. Cir. 2001) (when dealing with emerging competition, no showing of actual harm is required; the proper test is whether "the exclusion of nascent threats [would be]. reasonably capable of contributing significantly to a defendant's continued monopoly power."); *Realcomp*, 2009 FTC LEXIS 250, at *46 ("elaborate econometric proof that [the restraint] resulted in higher prices" is unnecessary (quotation omitted)). This is particularly true in this case, given the parties' agreement that data were not available to do a study of price effects. (Kwoka, Tr. 1029-39, 1187; Baumer, Tr. 1978-79; CX822 at 15.)

In addition to increasing prices, the Board's conduct deprived consumers of choice. *Realcomp*, 2009 FTC LEXIS 250, at *111 (liability under rule of reason appropriate if respondent's practices "narrow consumer choice or hinder the competitive process").

The Board deprived consumers of the option of going to a mall, salon, or spa for teeth whitening services. In addition, consumers can no longer obtain same-day teeth whitening services (unless their local dentist provides walk-in teeth whitening service). The courts recognize that the elimination of products desired by consumers reduces consumer welfare. *Indiana Federation of Dentists*, 476 U.S. at 459 (absent a procompetitive virtue, "an agreement limiting consumer choice cannot be sustained under the Rule of Reason"); *Conwood Co. v. U.S. Tobacco Co.*, 290 F.3d 768, 789 (6th Cir. 2002) (defendant's "actions caused higher prices and reduced consumer choice, both of which are harmful to competition"). Both parties' experts agree. (Kwoka, Tr. 1031-33, 1102, 1181-82; Baumer, Tr. 1776 (referring to CX822 at 29); 1974-76; CX822 at 16.)

d. Procompetitive Justifications

Notwithstanding our finding that the Board's conduct is anticompetitive under a more fulsome rule of reason analysis, Respondent may be able to defeat a finding of liability if its practices can be "justified by plausible arguments that they were intended to enhance overall efficiency and make markets more competitive." *Northwest Wholesale Stationers*, 472 U.S. at 294.

As discussed at length in Section VI.B.1.b above, however, Respondent's proffered justifications fail to satisfy those standards. Respondent asserts that its effort to exclude non-dentist providers of teeth whitening services would promote public safety and protect "legal competition" for teeth whitening services. Under Supreme Court precedent, these are

not valid justifications for anticompetitive conduct. Furthermore, the asserted defenses do not appear to be plausibly related to any goal of the antitrust laws, such as increasing output or innovation. Accordingly, Respondent has failed to overcome the anticompetitive effects of its conduct with any legitimate, procompetitive justifications. We therefore conclude that the Board's actions also violated the antitrust laws under a full rule of reason analysis.

VII. REMEDY

To remedy Respondent's violation of Section 5, the ALJ issued an Order prohibiting the Board from directing non-dentists to cease providing teeth whitening products and services. (ID at 110-17, 123-30.) The Order also requires the Board not to communicate to any current or prospective non-dentist provider, lessor of commercial property, or actual or prospective distributor of teeth whitening products that a non-dentist's teeth whitening products or services violate the Dental Practice Act. (ID at 112, 124.) However, the ALJ's Order expressly carves out certain Board actions from these prohibitions (to which we make one addition). The Order does not prohibit the Board from investigating and prosecuting suspected violations of the Dental Practice Act. Further, the Order permits the Board to communicate its opinion that certain teeth whitening products or services may violate the Dental Practice Act, and its bona fide intention to seek court action or to seek administrative remedies for suspected violations of the Act so long as such communications include a prescribed statement notifying the recipient that the Board cannot make

legal determinations or order the recipient to discontinue providing teeth whitening products or services. Finally, the ALJ ordered the Board to send notices to parties affected by the Order, as well as various ancillary relief, including reporting and record keeping requirements to enable the Commission to verify compliance with the Order. (ID at 114-15, 125-27.)

The Commission is "clothed with wide discretion" to determine the type of order necessary to remedy a violation of FTC Act. *Chicago Bridge & Iron Co. v. FTC*, 534 F.3d 410, 441 (5th Cir. 2008); *see also Jacob Siegel Co. v. FTC*, 327 U.S. 608, 611 (1946); *American Medical Association*, 94 F.T.C. 701 (1979). The Commission has wide latitude to extend the order as needed to prevent future violations and remediate past harms. "Having established a violation, the Commission must 'be allowed effectively to close all roads to the prohibited goal, so that the order may not be by-passed with impunity.'" *American Medical Association*, 94 F.T.C. at 1010-11 (citing *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952)). However, the Commission's discretion is not unlimited; its remedy must be reasonably related to the violation. *Ruberoid*, 343 U.S. at 473; *Jacob Siegel*, 327 U.S. at 613.

The Commission has determined to issue a Final Order very similar to the ALJ's proposed remedy. The Final Order is reasonably tailored to remediating the effects of the Board's past violations and preventing future violations. Moreover, it provides an effective remedy for Respondent's illegal conduct without impeding the Board's ability to fulfill its

statutory role in the regulation of dentists and the practice of dentistry in North Carolina.

As discussed above and in the ALJ's opinion, the Board's illegal activity centered on enforcing its determination that non-dentists providing any teeth whitening services violated the Dental Practice Act by sending out various communications, including cease and desist letters, that exceeded its statutory authority. Section II of the Final Order prevents the Board from continuing these unlawful practices. It prohibits the Board from directing a non-dentist provider to stop providing teeth whitening products and services (Final Order § II, ¶ A), or impeding or discouraging non-dentist providers from providing teeth whitening products and services (Final Order § II, ¶ B).

Section II of the Final Order also requires the Board to cease and desist from communicating to any non-dentist provider that it is a violation of the Dental Practice Act for a non-dentist to provide teeth whitening goods and services, or that such provider's provision of teeth whitening products or services violates the Act. (Final Order § II, ¶ C.) The Final Order further prohibits the Board from making similar communications to third parties, including prospective providers of teeth whitening goods and services, current or prospective lessors of commercial property, and manufacturers or distributors of teeth whitening products. (Final Order § II, ¶¶ D-F.) The Final Order thus prohibits the types of communications that the Board used to exclude non-dentist providers from the provision of teeth whitening goods and services. Accordingly, these restrictions are reasonable and necessary to prevent

future illegal activity by the Board. Further, the Board can effectively carry out its statutory responsibilities without such communications. Indeed, as the facts illustrate here, communications of the type prohibited by the Final Order may confuse recipients as to the actual role and authority of the Board. (IDF 246.)

To ensure the Board cannot indirectly accomplish what it has been barred from doing directly, Section II. G of the Final Order also prohibits the Board from inducing or assisting any other person in discouraging the provision of teeth whitening by non-dentist providers. This type of prohibition is well within the authority of the Commission. *See Ruberoid*, 343 U.S. at 473 (FTC orders need not be restricted to the "narrow lane" of the respondent's violation, but rather may "close all roads to the prohibited goal, so that its order may not be by-passed with impunity"); *Toys "R" Us*, 221 F.3d at 940 ("[T]he FTC is not limited to restating the law in its remedial orders. Such orders can restrict the options for a company that has violated § 5, to ensure that the violation will cease and competition will be restored."). This prohibition is substantively identical to the analogous provision in the ALJ's Order but incorporates a clarifying edit.

The final portion of Section II of the Final Order ensures that the Board will be able to carry out its legitimate statutory duties by excluding certain acts from the scope of the prohibitions contained in the Section. Specifically, it states that nothing in the Final Order prohibits the investigation and prosecution of non-dentists for alleged violations of the Dental Practice Act. Further, it ensures that the

Final Order will not be read to prevent the Board from communicating its opinion regarding whether a particular method of teeth whitening violates the Dental Practice Act or from providing notice of its bona fide intention to bring a legal proceeding against a person for violating the Dental Practice Act.

We add an additional provision to this portion of the Final Order to make it clear that the Board may also communicate factual information regarding changes to North Carolina statutes or future legal proceedings in North Carolina regarding teeth whitening services provided by non-dentist providers. (Final Order § II, second subsection (ii).) To ensure that these communications are not misleading as to the statutory authority and role of the Board, or otherwise violate the prohibitions contained in Section II, the Final Order requires the Board to include in the communications the disclosure set forth in Appendix A of the Final Order. We also clarify in the first subsection (iii) of Section II of the Final Order that nothing in the Final Order prohibits the use of administrative proceedings against dentists for alleged violations of the Dental Practice Act. This change is necessary because administrative remedies are only available against dentists. (IDF 46, 48.)

Section III of the Final Order requires the Board to send notices and other disclosures to parties affected by the Final Order. Such notices are within the Commission's remedial authority. *See Realcomp*, 2009 FTC LEXIS 250, at *129 (requiring respondent to provide a copy of the Commission's order to affected persons). In particular, Section III requires the Board to send copies of the Complaint and Final

Order to all present and future members, employees, and agents of the Board. This will facilitate compliance with the Final Order. Section III also requires the Board to send certain disclosures to each person to whom the Board previously sent a cease and desist letter or similar communication regarding the legality of non-dentist teeth whitening. Such disclosures will help rectify the Board's prior illegal conduct by correcting the impressions created by the Board's communications. *Cf. Novartis Corp. v. FTC*, 223 F.3d 783, 786 (D.C. Cir. 2000) (upholding order requiring corrective advertising); *Southwest Sunsites, Inc. v. FTC*, 785 F.2d 1431, 1439 (9th Cir. 1986) (same).

Finally, the Final Order imposes limited requirements on the Board to facilitate the Commission's ability to monitor the Board's compliance with the terms of the Final Order. The Board is required to provide an initial compliance report, followed by annual reports thereafter, containing specified information and to provide Commission representatives with reasonable access to information and personnel as needed to verify compliance with the Final Order. (Final Order §§ IV-VI.) Such ancillary provisions are common in Commission orders. *See, e.g., Realcomp*, 2009 FTC LEXIS 250, at *130 (requiring compliance reports); *Advocate Health Partners*, No. C-4184, 2007 FTC LEXIS 17, at *26-28 (2007) (requiring compliance reports and reasonable inspection).

Respondent does not appeal any specific provision of the ALJ's Order but argues that the ALJ's Order, taken as a whole, would restrict the Board's ability to conduct bona fide investigations into possible

violations of the North Carolina Dental Practice Act, would prevent the Board from enforcing the Act, and would violate the Commerce Clause of and Tenth Amendment to the U.S. Constitution. We find these arguments to be without merit.

Respondent argues first that the "Order clearly restricts the State Board's ability to conduct a bona fide investigation into possible violations of the North Carolina Dental Practice Act, as it renders useless the State Board's ability to prevent unlicensed teeth whitening services." (RAB at 40.) To the contrary, as discussed above, the Final Order is much more limited and specifically states that "nothing in this Order prohibits the Board from investigating a Non-Dentist Provider for suspected violations of the Dental Practice Act." (Final Order § II.) The Final Order explicitly permits the Board to bring (or cause to be brought) judicial proceedings against non-dentist providers, to bring administrative proceedings against dentists, and to send bona fide litigation warning letters to targets of investigations. (*Id.*) Since the Board's authority to enforce the Dental Practice Act against non-dentists is limited to seeking recourse from the North Carolina courts or referring a matter to a District Attorney (N.C. General Statutes § 90-40.1; IDF 43, 44, 190; Response to Complaint ¶ 19; RAB at 2-3; RRB at 5), the Final Order will not prevent or impede the Board from carrying out its enforcement duties. Indeed, the Board's Chief Operating Officer testified that the Board's ability to enforce the Act would not be affected if it sent litigation warning letters instead of cease and desist letters. (IDF 258; *see also* IDF 259-60 (no cease and desist language in Board letters from 2000 to 2002).)

Respondent also argues that the ALJ's Order would violate the Tenth Amendment to the U.S. Constitution by directing the actions of state officials. Respondent relies on *New York v. United States*, 505 U.S. 144 (1992) and *Printz v. United States*, 521 U.S. 898 (1997). In these cases, the Supreme Court held that Congress may not enact a law that would direct the functioning of the states' executives or legislatures but may enact laws of general applicability that incidentally apply to state governments. *See* Printz, 521 U.S. at 932 ("the incidental application to the States of a federal law of general applicability" is lawful); *New York*, 505 U.S. at 160 (Congress may "subject state governments to generally applicable laws"); *see also Kennedy v. Allera*, 612 F.3d 261, 269 (4th Cir. 2010) ("[T]he Tenth Amendment prohibits the federal government from commandeering state officers by compelling them to enforce a federal regulatory program."). It is undisputed that the FTC Act is a statute of general applicability and is not directed at states or state officials. Accordingly, the Court's line of cases prohibiting the commandeering of state officials is inapplicable.

Alternatively, Respondent asserts that under *California State Board of Optometry v. FTC*, 910 F.2d 976 (D.C. Cir. 1990), the Tenth Amendment prevents the FTC from imposing restrictions on a state's regulatory scheme.[20] Respondent overreaches by

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[20] Respondent also asserts that *California State Board of Optometry* held that a state cannot be a "person" for purposes of jurisdiction when it acts in its sovereign capacity. (RAB at 24.) That decision, even under Respondent's reading, is inapposite because the Board is not a sovereign, and the challenged

trying to stretch that case to include activity that is outside the scope of the regulatory scheme of the Dental Practice Act. In *California State Board of Optometry*, the D.C. Circuit reviewed an FTC trade regulation rule, passed pursuant to the Magnuson-Moss Amendments to the FTC Act, declaring that certain state laws restricting the practice of optometry constituted unfair acts or practices. The court held that state regulation of the practice of optometry is a quintessentially sovereign act and therefore rejected the rule as an improper attempt to regulate state action. In contrast, this case does not involve a challenge to a state law or regulation, but rather a challenge to conduct by the Board that went beyond its statutory mandate. Furthermore, the Commission has already concluded that the Board's conduct in question does not satisfy the requirements of the state action defense. *See North Carolina Dental*, 151 F.T.C. at 615-33.

Finally, Respondent argues, without citation to any case law, that the ALJ's Order would violate the Commerce Clause of the U.S. Constitution because it regulates the practice of dentistry in North Carolina. To the contrary, however, the Final Order neither regulates the practice of dentistry nor violates the Commerce Clause of the Constitution. The Constitution grants Congress the power to "regulate Commerce among the several states." U.S. Constitution, art. I, § 8, cl. 3. Pursuant to this

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practices exceeded what the North Carolina legislature authorized. In addition, the Commission's jurisdiction to hear this matter was resolved in the Commission's February 3, 2011 decision, and Respondent did not dispute that it is a "person" before the ALJ. (ID at 59.)

authority, Congress passed the FTC Act and gave the agency the authority to prevent, *inter alia*, "[u]nfair methods of competition in or affecting commerce." 15 U.S.C. § 45(a). The jurisdictional reach of the Commission extends as far as the Commerce Clause. (ID at 59-62.) The ALJ found, and Respondent does not dispute in this appeal, that the Board's acts have a substantial effect on interstate commerce and are therefore in or affecting commerce. (ID at 62.) Furthermore, as described above, the Final Order does not regulate the practice of dentistry in North Carolina. The Commission has declined to address whether teeth whitening constitutes stain removal under the Dental Practice Act, and the Final Order does not interfere with the ability of the Board to fulfill its statutory obligations. Rather, the Final Order is limited to ensuring that the Board does not violate the antitrust laws through anticompetitive acts and practices that are not authorized or required by the Dental Practice Act.

VIII. CONCLUSION

Based on a *de novo* review of the facts and law in this matter, the Commission concludes that the Board has violated Section 5 of the FTC Act, 15 U.S.C. § 45. The Commission has therefore issued a Final Order to remedy the Board's violations and to prevent their recurrence.

APPENDIX D

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Jon Leibowitz, Chairman**
J. Thomas Rosch
Edith Ramirez
Julie Brill

In the Matter of	
The North Carolina State Board of Dental Examiners	**Docket No. 9343**

FINAL ORDER

The Commission has heard this matter upon the appeal of Respondent from the Initial Decision, and upon briefs and oral argument in support thereof and in opposition thereto. For the reasons stated in the accompanying Opinion of the Commission, the Commission has determined to sustain the Initial Decision with certain modifications:

IT IS ORDERED that the Initial Decision of the administrative law judge be, and it hereby is, adopted as the Findings of Fact and Conclusions of Law of the Commission, to the extent not inconsistent with the findings of fact and conclusions contained in the accompanying Opinion.

Other findings of fact and conclusions of law of the Commission are contained in the accompanying Opinion.

IT IS FURTHER ORDERED that the following Order to cease and desist be, and it hereby is, entered:

ORDER

I.

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

A. "Board" means the North Carolina State Board of Dental Examiners ("NCSBDE"), its officers, directors, members, employees, agents, attorneys, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates controlled by it; and the respective officers, directors, members, employees, agents, attorneys, representatives, successors, and assigns of each.

B. "Communicate" or "Communicating" means exchanging, transferring, or disseminating any information, without regard to the manner or means by which it is accomplished.

C. "Communication" means any information exchange, transfer, or dissemination, without regard to the means by which it is accomplished, including, without limitation, oral or written, in any manner, form, or transmission medium.

D. "Dental Practice Act" means any legislation that is administered by the Board, including, North Carolina General Statutes, Chapter 90, Article 2 (Dentistry) (N.C. Gen. Stat. §§ 90-22 90-48.3 (2010)) and Article 16 (Dental Hygiene Act) (N.C. Gen. Stat. §§ 90-221 90-233.1 (2010)).

E. "Dentist" means any individual holding a license, issued by the Board, to practice dentistry in North Carolina.

F "Direct" or "Directing" means to order, direct, command or instruct.

G. "Non-Dentist Provider" means any Person other than a Dentist engaged in the provision, distribution or sale of any Teeth Whitening Goods or Teeth Whitening Services.

H. "Person" means both natural persons and artificial persons, including, but not limited to, corporations, and unincorporated entities.

I. "Principal Address" means either (i) primary business address, if there is a business address, or (ii) primary residential address, if there is no business address.

J. "Teeth Whitening Goods" means any formulation containing a peroxide bleaching agent, whether or not used in conjunction with an LED light source, and any other ancillary products used in the provision of Teeth Whitening Services.

K. "Teeth Whitening Services" means whitening teeth through the use of a formulation containing a peroxide bleaching agent, whether or not used in conjunction with an LED light source.

L. "Third Party" means any Person other than NCSBDE.

II.

IT IS FURTHER ORDERED that Respondent, directly or indirectly, or through any corporate or other device, in connection with the provision of Teeth Whitening Services in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, cease and desist from:

A. Directing a Non-Dentist Provider to cease providing Teeth Whitening Goods or Teeth Whitening Services;

B. Prohibiting, restricting, impeding, or discouraging the provision of Teeth Whitening Goods or Teeth Whitening Services by a Non-Dentist Provider;

C. Communicating to a Non-Dentist Provider that; (i) such Non-Dentist Provider is violating, or has violated the Dental Practice Act by providing Teeth Whitening Goods or Teeth Whitening Services; or (ii) the provision of Teeth Whitening Goods or Teeth Whitening Services by a Non-Dentist Provider is a violation of the Dental Practice Act;

D. Communicating to a prospective Non-Dentist Provider that: (i) a Non-Dentist Provider would violate the Dental Practice Act by providing Teeth Whitening Goods or Teeth Whitening Services; or (ii) the provision of Teeth Whitening Goods or Teeth Whitening Services by a Non-Dentist Provider would violate the Dental Practice Act;

E. Communicating to a lessor of commercial property or any other Third Party that (i) the provision of Teeth Whitening Goods or Teeth Whitening Services by a Non-Dentist Provider is a violation of the Dental Practice Act, or (ii) that any Non-Dentist Provider is violating or has violated the Dental Practice Act by providing Teeth Whitening Goods or Teeth Whitening Services;

F Communicating to an actual or prospective manufacturer, distributor, or seller of Teeth Whitening Goods used by Non-Dentist Providers, or to any other Third Party that (i) the provision of Teeth Whitening Goods or Teeth Whitening Services

by a Non-Dentist Provider is a violation of the Dental Practice Act, or (ii) that any Non-Dentist Provider is violating or has violated the Dental Practice Act by providing Teeth Whitening Goods or Teeth Whitening Services; and

G. Inducing, urging, encouraging, assisting or attempting to induce, any Person to engage in any action that would violate Paragraphs II.A through II.F if such action were taken by Respondent;

Provided, however, that nothing in this Order prohibits the Board from:

(i) investigating a Non-Dentist Provider for suspected violations of the Dental Practice Act;

(ii) filing, or causing to be filed, a court action against a Non-Dentist Provider for an alleged violation of the Dental Practice Act pursuant to N.C. Gen. Stat. §§ 90-40, 90-40.1, or 90-233.1; or

(iii) pursuing any administrative remedies against a Dentist pursuant to and in accordance with the North Carolina Annotated Code;

Provided further, that nothing in this Order prohibits the Board from Communicating to a Third Party:

(i) notice of its belief or opinion regarding whether a particular method of providing Teeth Whitening Goods or Teeth Whitening Services may violate the Dental Practice Act;

(ii) factual information regarding legislation and court proceedings concerning Teeth Whitening Goods or Teeth Whitening

Services provided by Non-Dentist Providers;

(iii) notice of its bona fide intention to file a court action against that Person for a suspected violation of the Dental Practice Act with regard to Teeth Whitening Goods or Teeth Whitening Services; or

(iii) notice of its bona fide intention to pursue administrative remedies with regard to Teeth Whitening Goods or Teeth Whitening Services,

so long as such Communication includes, with equal prominence, the paragraph included in Appendix A to this Order.

III.

IT IS FURTHER ORDERED that Respondent shall:

A. Within thirty (30) days from the date this Order becomes final, send a copy of this Order and the Complaint by first-class mail with delivery confirmation or electronic mail with return confirmation to:

1. each Board member; and
2. each officer, director, manager, representative, agent, attorney, and employee of the Board;

B. Distribute by first-class mail, return receipt requested, a copy of this Order and the Complaint to each individual who becomes a Board member, or an officer, director, manager, attorney, representative, agent or employee of Board, and who did not previously receive a copy of this Order and the

Complaint from Respondent, within ten (10) days of the time that he or she assumes such position;

C. Within thirty (30) days from the date this Order becomes final, send a copy of the letter, on the Board's official letterhead, with the text included in Appendix B to this Order, by first-class mail with delivery confirmation or electronic mail with return confirmation to:

1. each Person, including without limitation actual or prospective Non-Dentist Providers, manufacturers of goods and services used by Non-Dentists Providers, or any other Third Party, to whom the Board Communicated a cease-and-desist order, letter, or other similar Communication;

2. each Person, including without limitation actual or prospective lessors of commercial property or any other Third Party, to whom the Board Communicated (i) that the provision of Teeth Whitening Goods or Teeth Whitening Services by a Non-Dentist Provider is a violation of the Dental Practice Act, or (ii) that any Non-Dentist Provider is violating, has violated, or may be violating the Dental Practice Act by providing Teeth Whitening Goods or Teeth Whitening Services; and

3. any other Third Party to whom, or with whom, the Board Communicated substantially the same information set forth in C.1 and C.2 of this Paragraph III;

D. Within sixty (60) days from the date this Order becomes final, Respondent shall arrange with the North Carolina Board of Cosmetic Art Examiners for

the notice included as Appendix C to this Order to appear on the website of that Board for a period of six (6) months;

Provided, however, should Respondent be unable within sixty (60) days to arrange with the North Carolina Board of Cosmetic Art Examiners for such notice to appear on that Board's website, Respondent shall within ninety (90) days from the date this Order becomes final: (1) obtain from the North Carolina Board of Cosmetic Art Examiners its most current list of licensees; and (2) send the Appendix C notification by first-class mail with delivery confirmation or electronic mail with return confirmation to each licensee on that current list;

IV.

IT IS FURTHER ORDERED that Respondent shall file verified written reports within sixty (60) days from the date this Order becomes final, annually thereafter for three (3) years on the anniversary of the date this Order becomes final, and at such other times as the Commission may by written notice require. Each report shall include, among other information that may be necessary:

A. The identity, including address and telephone number, of each Non-Dentist Provider, and any other Third Party, that the Board Communicated with during the relevant reporting period regarding Teeth Whitening Goods or Teeth Whitening Services;

B. Copies of all Communications with any Non-Dentist Provider, and any other Third Party regarding the provision of Teeth Whitening Goods or Teeth Whitening Services;

C. Copies of the delivery confirmations or electronic mail with return confirmations required by Paragraph III. A and B; and

D. A detailed description of the manner and form in which Respondent has complied, and is complying, with this Order.

V

IT IS FURTHER ORDERED that Respondent shall notify the Commission of any change in its principal address within twenty (20) days of such change in address.

VI.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days' notice to NCSBDE, that NCSBDE shall, without restraint or interference, permit any duly authorized representative of the Commission:

A. Access, during office hours of NCSBDE and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession, or under the control, of NCSBDE relating to compliance with this Order, which copying services shall be provided by NCSBDE at its expense; and

B. To interview officers, directors, or employees of NCSBDE, who may have counsel present, regarding such matters.

VII.

IT IS FURTHER ORDERED that this Order shall terminate on December 2, 2031.

Appendix A

The Federal Trade Commission issued a Final Order on December 2, 2011, which requires the Dental Board to provide you with the following Notice. The Dental Board hereby notifies you that the opinion of the Dental Board expressed in this communication is not a legal determination. The Dental Board does not have the authority to order you to discontinue providing Teeth Whitening Goods or Teeth Whitening Services. Only a court may determine that you have violated, or are violating, any law, and, if appropriate, impose a remedy or penalty for such violation.

Further, pursuant to 21 N.C.A.C. 16N .0400 and N.C. Gen. Stat. § 150B-4, you may have the right, prior to the initiation of any court action by the Dental Board, to request a declaratory ruling regarding whether your method of providing teeth whitening goods or services is lawful.

You are further notified that any right to a declaratory ruling from the Dental Board supplements any other legal rights that you may already have to establish the legality of your teeth whitening goods or services. Complete copies of the Federal Trade Commission's Complaint and Final Order are available on the Commission's website at http://www.ftc.gov.

Appendix B

(Letterhead of NCSBDE)

(Name and Address of the Recipient)

Dear (Recipient):

As you may know, the Federal Trade Commission issued an Administrative Complaint in 2010 against the Dental Board challenging the legality of the Dental Board's attempts to restrict the provision of teeth whitening services by non-dentists in North Carolina. At the conclusion of that administrative proceeding, the Commission issued a Final Order requiring the Dental Board, among other things, to cease and desist from certain activities involving teeth whitening by non-dentists and to take certain remedial actions, of which this letter is one part. Complete copies of the Federal Trade Commission's Complaint and Final Order are available on the Commission's website at http://www.ftc.gov.

You are receiving this letter because you previously received from the Dental Board either: (1) a letter directing or ordering you to cease and desist the unlicensed provision of dental teeth whitening services, or selling dental teeth whitening goods or services to non-dentist teeth whiteners, in violation of the Dental Practice Act, N.C. Gen. Stat. §§ 90-29(b)(2), 90-40, and/or 90-40.1; or (2) a letter advising you (i) that a non-dentist would or might violate the Dental Practice Act by providing teeth whitening goods or services; or (ii) that the provision of teeth whitening goods or services by a non-dentist would or might violate the Dental Practice Act, N.C. Gen. Stat. §§ 90-29(b)(2), 90-40, and/or 90-40.1.

The Dental Board hereby notifies you that the prior letter you received from the Dental Board only expressed the opinion of the Dental Board, and that such opinion is not a legal determination. The Dental Board does not have the authority to order

you to discontinue providing Teeth Whitening Goods or Teeth Whitening Services. Only a court may determine that you are violating, or have violated, any law and, if appropriate, impose a remedy or penalty for such violation. Further, you may have the right to request a declaratory ruling from the Dental Board, pursuant to 21 N.C.A.C. 16N .0400 and N.C. Gen. Stat. § 150B-4, regarding whether a particular method of providing teeth whitening goods or services is lawful. You are further notified that any right to a declaratory ruling from the Dental Board supplements any other legal rights that you may already have to establish the legality of any particular method of providing teeth whitening goods or services.

Appendix C

Teeth Whitening Notice

As you may know, the Federal Trade Commission issued an Administrative Complaint in 2010 against the Dental Board challenging the legality of the Dental Board's attempts to restrict the provision of teeth whitening services by non-dentists in North Carolina. At the conclusion of that administrative proceeding, the Commission issued a Final Order requiring the Dental Board, among other things, to cease and desist from certain activities involving teeth whitening by non-dentists and to take certain remedial actions, of which this Notice is one part. Complete copies of the Federal Trade Commission's Complaint and Final Order are available on the Commission's website at http://www.ftc.gov.

In 2007, the Cosmetology Board, at the request of the Dental Board, displayed a "Teeth Whitening Bulletin" on the Cosmetology Board's website

advising cosmetologists and estheticians "that any process that 'removes stains, accretions or deposits from human teeth' constitutes the practice of dentistry Taking impressions for bleaching trays also constitutes the practice of dentistry " That Bulletin further advised that it was a misdemeanor for anyone other than a licensed dentist to provide those services.

The Dental Board hereby notifies you that the prior Bulletin, described above, only expressed the opinion of the Dental Board, and that such opinion is not a legal determination. The Dental Board does not have the authority to order you to discontinue providing Teeth Whitening Goods or Teeth Whitening Services. Only a court may determine that you have violated, or are violating, any law and, if appropriate, to impose a remedy or penalty for such violation. Further, you may have the right to request a declaratory ruling from the Dental Board, pursuant to 21 N.C.A.C. 16N .0400 and N.C. Gen. Stat. § 150B-4, regarding whether a particular method of providing teeth whitening goods or services is lawful. You are further notified that any right to a declaratory ruling from the Dental Board supplements any other legal rights that you may already have to establish the legality of any particular method of providing teeth whitening goods or services.

By the Commission, Commissioner Brill recused.

Donald S. Clark
Secretary

ISSUED: December 2, 2011

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 12-1172
(No. 9343)

THE NORTH CAROLINA STATE
BOARD OF DENTAL EXAMINERS
Petitioner

v.

FEDERAL TRADE COMMISSION
Respondent

AMERICAN DENTAL ASSOCIATION; AMERICAN OSTEOPATHIC ASSOCIATION; AMERICAN VETERINARY MEDICAL ASSOCIATION; AMERICAN ACADEMY OF PEDIATRIC DENTISTRY; AMERICAN ACADEMY OF PERIODONTOLOGY; AMERICAN ASSOCIATION OF ORTHODONTISTS; AMERICAN ASSOCIATION OF DENTAL BOARDS; FEDERATION OF STATE MEDICAL BOARDS; AMERICAN MEDICAL ASSOCIATION; NORTH CAROLINA MEDICAL SOCIETY; SOUTH CAROLINA MEDICAL ASSOCIATION; MEDICAL SOCIETY OF VIRGINIA; WEST VIRGINIA STATE MEDICAL ASSOCIATION; NATIONAL ASSOCIATION OF BOARDS OF PHARMACY; NORTH CAROLINA BOARD OF PHARMACY; THE FEDERATION OF STATE BOARDS OF PHYSICAL THERAPY; THE

FEDERATION OF ASSOCIATIONS OF REGULATORY BOARDS; THE ASSOCIATION OF SOCIAL WORK BOARDS; THE AMERICAN ASSOCIATION OF VETERINARY STATE BOARDS; THE FEDERATION OF CHIROPRACTIC LICENSING BOARDS; THE FEDERATION OF STATE MASSAGE THERAPY BOARDS; INTERNATIONAL CONFERENCE OF FUNERAL SERVICE EXAMINING BOARDS, INCORPORATED; THE NATIONAL ASSOCIATION OF LONG TERM CARE ADMINISTRATOR BOARDS; THE NATIONAL BOARD FOR CERTIFICATION IN OCCUPATIONAL THERAPY; NORTH CAROLINA STATE BAR

Amici Supporting Petitioner

AMERICAN ANTITRUST INSTITUTE

Amicus Supporting Respondent

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Shedd, Judge Keenan and Judge Wynn.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX F

15 U.S.C. § 1 provides:

§ 1 Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 45 provides:

§ 45 Unfair methods of competition unlawful; prevention by Commission

(a) Declaration of unlawfulness; power to prohibit unfair practices; inapplicability to foreign trade

(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.

(2) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan

institutions described in section 57a(f)(3) of this title, Federal credit unions described in section 57a(f)(4) of this title, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to part A of subtitle VII of Title 49, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended [7 U.S.C.A. § 181 et seq.], except as provided in section 406(b) of said Act [7 U.S.C.A. § 227(b)], from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

(3) This subsection shall not apply to unfair methods of competition involving commerce with foreign nations (other than import commerce) unless—

(A) such methods of competition have a direct, substantial, and reasonably foreseeable effect—

(i) on commerce which is not commerce with foreign nations, or on import commerce with foreign nations; or

(ii) on export commerce with foreign nations, of a person engaged in such commerce in the United States; and

(B) such effect gives rise to a claim under the provisions of this subsection, other than this paragraph.

If this subsection applies to such methods of competition only because of the operation of subparagraph (A)(ii), this subsection shall apply to such conduct only for injury to export business in the United States.

(4)(A) For purposes of subsection (a) of this section, the term "unfair or deceptive acts or practices" includes such acts or practices involving foreign commerce that—

(i) cause or are likely to cause reasonably foreseeable injury within the United States; or

(ii) involve material conduct occurring within the United States.

(B) All remedies available to the Commission with respect to unfair and deceptive acts or practices shall be available for acts and practices described in this paragraph, including restitution to domestic or foreign victims.

(b) Proceeding by Commission; modifying and setting aside orders

Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make

application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this subchapter, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require, except that (1) the said person, partnership, or corporation may, within sixty days after service

upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section; and (2) in the case of an order, the Commission shall reopen any such order to consider whether such order (including any affirmative relief provision contained in such order) should be altered, modified, or set aside, in whole or in part, if the person, partnership, or corporation involved files a request with the Commission which makes a satisfactory showing that changed conditions of law or fact require such order to be altered, modified, or set aside, in whole or in part. The Commission shall determine whether to alter, modify, or set aside any order of the Commission in response to a request made by a person, partnership, or corporation under paragraph[1] (2) not later than 120 days after the date of the filing of such request.

(c) Review of order; rehearing

Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith

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[1] So in original. Probably should be "clause"

transmitted by the clerk of the court to the Commission, and thereupon the Commission shall file in the court the record in the proceeding, as provided in section 2112 of Title 28. Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the Commission until the filing of the record and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgement to prevent injury to the public or to competitors pendente lite. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return

of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 1254 of Title 28.

(d) Jurisdiction of court

Upon the filing of the record with it the jurisdiction of the court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive.

(e) Exemption from liability

No order of the Commission or judgement of court to enforce the same shall in anywise relieve or absolve any person, partnership, or corporation from any liability under the Antitrust Acts.

(f) Service of complaints, orders and other processes; return

Complaints, orders, and other processes of the Commission under this section may be served by anyone duly authorized by the Commission, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the residence or the principal office or place of business of such person, partnership, or corporation; or (c) by mailing a copy thereof by registered mail or by certified mail addressed to such person, partnership, or corporation at his or its residence or principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the

same, and the return post office receipt for said complaint, order, or other process mailed by registered mail or by certified mail as aforesaid shall be proof of the service of the same.

(g) Finality of order

An order of the Commission to cease and desist shall become final—

(1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; but the Commission may thereafter modify or set aside its order to the extent provided in the last sentence of subsection (b).

(2) Except as to any order provision subject to paragraph (4), upon the sixtieth day after such order is served, if a petition for review has been duly filed; except that any such order may be stayed, in whole or in part and subject to such conditions as may be appropriate, by—

(A) the Commission;

(B) an appropriate court of appeals of the United States, if (i) a petition for review of such order is pending in such court, and (ii) an application for such a stay was previously submitted to the Commission and the Commission, within the 30-day period beginning on the date the application was received by the Commission, either denied the application or did not grant or deny the application; or

(C) the Supreme Court, if an applicable petition for certiorari is pending.

(3) For purposes of subsection (m)(1)(B) of this section and of section 57b(a)(2) of this title, if a petition for review of the order of the Commission has been filed—

(A) upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals and no petition for certiorari has been duly filed;

(B) upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals; or

(C) upon the expiration of 30 days from the date of issuance of a mandate of the Supreme Court directing that the order of the Commission be affirmed or the petition for review be dismissed.

(4) In the case of an order provision requiring a person, partnership, or corporation to divest itself of stock, other share capital, or assets, if a petition for review of such order of the Commission has been filed—

(A) upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals and no petition for certiorari has been duly filed;

(B) upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals; or

(C) upon the expiration of 30 days from the date of issuance of a mandate of the Supreme Court directing that the order of the Commission be affirmed or the petition for review be dismissed.

(h) Modification or setting aside of order by Supreme Court

If the Supreme Court directs that the order of the Commission be modified or set aside, the order of the Commission rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of thirty days from the time it was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected to accord with the mandate, in which event the order of the Commission shall become final when so corrected.

(i) Modification or setting aside of order by Court of Appeals

If the order of the Commission is modified or set aside by the court of appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered in accordance with the mandate of the court of appeals shall become final on the expiration of thirty days from the time such order of the Commission was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected so that it will accord with the mandate, in which event the order of the Commission shall become final when so corrected.

(j) Rehearing upon order or remand

If the Supreme Court orders a rehearing; or if the case is remanded by the court of appeals to the Commission for a rehearing, and if (1) the time allowed for filing a petition for certiorari has expired, and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the

decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered upon such rehearing shall become final in the same manner as though no prior order of the Commission had been rendered.

(k) "Mandate" defined

As used in this section the term "mandate", in case a mandate has been recalled prior to the expiration of thirty days from the date of issuance thereof, means the final mandate.

(*l*) Penalty for violation of order; injunctions and other appropriate equitable relief

Any person, partnership, or corporation who violates an order of the Commission after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $10,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the Attorney General of the United States. Each separate violation of such an order shall be a separate offense, except that in a case of a violation through continuing failure to obey or neglect to obey a final order of the Commission, each day of continuance of such failure or neglect shall be deemed a separate offense. In such actions, the United States district courts are empowered to grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the Commission.

(m) Civil actions for recovery of penalties for knowing violations of rules and cease and desist orders respecting unfair or deceptive acts or practices; jurisdiction; maximum amount of

penalties; continuing violations; de novo determinations; compromise or settlement procedure

(1)(A) The Commission may commence a civil action to recover a civil penalty in a district court of the United States against any person, partnership, or corporation which violates any rule under this chapter respecting unfair or deceptive acts or practices (other than an interpretive rule or a rule violation of which the Commission has provided is not an unfair or deceptive act or practice in violation of subsection (a)(1) of this section) with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule. In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than $10,000 for each violation.

(B) If the Commission determines in a proceeding under subsection (b) of this section that any act or practice is unfair or deceptive, and issues a final cease and desist order, other than a consent order, with respect to such act or practice, then the Commission may commence a civil action to obtain a civil penalty in a district court of the United States against any person, partnership, or corporation which engages in such act or practice—

(1) after such cease and desist order becomes final (whether or not such person, partnership, or corporation was subject to such cease and desist order), and

(2) with actual knowledge that such act or practice is unfair or deceptive and is unlawful under subsection (a)(1) of this section.

In such action, such person, partnership, or

corporation shall be liable for a civil penalty of not more than $10,000 for each violation.

(C) In the case of a violation through continuing failure to comply with a rule or with subsection (a)(1) of this section, each day of continuance of such failure shall be treated as a separate violation, for purposes of subparagraphs (A) and (B). In determining the amount of such a civil penalty, the court shall take into account the degree of culpability, any history of prior such conduct, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

(2) If the cease and desist order establishing that the act or practice is unfair or deceptive was not issued against the defendant in a civil penalty action under paragraph (1)(B) the issues of fact in such action against such defendant shall be tried de novo. Upon request of any party to such an action against such defendant, the court shall also review the determination of law made by the Commission in the proceeding under subsection (b) of this section that the act or practice which was the subject of such proceeding constituted an unfair or deceptive act or practice in violation of subsection (a) of this section.

(3) The Commission may compromise or settle any action for a civil penalty if such compromise or settlement is accompanied by a public statement of its reasons and is approved by the court.

(n) Standard of proof; public policy consideration

The Commission shall have no authority under this section or section 57a of this title to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to

consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. In determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.

N.C. Gen. Stat. § 90-22 provides:

§ 90-22 Practice of dentistry regulated in public interest; Article liberally construed; Board of Dental Examiners; composition; qualifications and terms of members; vacancies; nominations and elections; compensation; expenditures by Board

(a) The practice of dentistry in the State of North Carolina is hereby declared to affect the public health, safety and welfare and to be subject to regulation and control in the public interest. It is further declared to be a matter of public interest and concern that the dental profession merit and receive the confidence of the public and that only qualified persons be permitted to practice dentistry in the State of North Carolina. This Article shall be liberally construed to carry out these objects and purposes.

(b) The North Carolina State Board of Dental Examiners heretofore created by Chapter 139, Public Laws 1879 and by Chapter 178, Public Laws 1915, is hereby continued as the agency of the State for the regulation of the practice of dentistry in this State. Said Board of Dental Examiners shall consist of six dentists who are licensed to practice dentistry in

North Carolina, one dental hygienist who is licensed to practice dental hygiene in North Carolina and one person who shall be a citizen and resident of North Carolina and who shall be licensed to practice neither dentistry nor dental hygiene. The dental hygienist or the consumer member cannot participate or vote in any matters of the Board which involves the issuance, renewal or revocation of the license to practice dentistry in the State of North Carolina. The consumer member cannot participate or vote in any matters of the Board which involve the issuance, renewal or revocation of the license to practice dental hygiene in the State of North Carolina. Members of the Board licensed to practice dentistry in North Carolina shall have been elected in an election held as hereinafter provided in which every person licensed to practice dentistry in North Carolina and residing or practicing in North Carolina shall be entitled to vote. Each member of said Board shall be elected for a term of three years and until his successor shall be elected and shall qualify. Each year there shall be elected two dentists for such terms of three years each. Every three years there shall be elected one dental hygienist for a term of three years. Dental hygienists shall be elected to the Board in an election held in accordance with the procedures hereinafter provided in which those persons licensed to practice dental hygiene in North Carolina and residing or practicing in North Carolina shall be entitled to vote. Every three years a person who is a citizen and resident of North Carolina and licensed to practice neither dentistry nor dental hygiene shall be appointed to the Board for a term of three years by the Governor of North Carolina. Any vacancy occurring on said Board shall be filled by a

majority vote of the remaining members of the Board to serve until the next regular election conducted by the Board, at which time the vacancy will be filled by the election process provided for in this Article, except that when the seat on the Board held by a person licensed to practice neither dentistry nor dental hygiene in North Carolina shall become vacant, the vacancy shall be filled by appointment by the Governor for the period of the unexpired term. No dentist shall be nominated for or elected to membership on said Board, unless, at the time of such nomination and election such person is licensed to practice dentistry in North Carolina and actually engaged in the practice of dentistry. No dental hygienist shall be nominated for or elected to membership on said Board unless, at the time of such nomination and election, such person is licensed to practice dental hygiene in North Carolina and is currently employed in dental hygiene in North Carolina. No person shall be nominated, elected, or appointed to serve more than two consecutive terms on said Board.

(c) Nominations and elections of members of the North Carolina State Board of Dental Examiners shall be as follows:

(1) An election shall be held each year to elect successors to those members whose terms are expiring in the year of the election, each successor to take office on the first day of August following the election and to hold office for a term of three years and until his successor has been elected and shall qualify; provided that if in any year the election of the members of such Board for that year shall not have been completed by August 1 of that year, then

the said members elected that year shall take office immediately after the completion of the election and shall hold office until the first of August of the third year thereafter and until their successors are elected and qualified. Persons appointed to the Board by the Governor shall take office on the first day of August following their appointment and shall hold office for a term of three years and until such person's successor has been appointed and shall qualify; provided that if in any year the Governor shall not have appointed a person by August first of that year, then the said member appointed that year shall take office immediately after his appointment and shall hold office until the first of August of the third year thereafter and until such member's successor is appointed and qualified.

(2) Every dentist with a current North Carolina license residing or practicing in North Carolina shall be eligible to vote in elections of dentists to the Board. Every dental hygienist with a current North Carolina license residing or practicing in North Carolina shall be eligible to vote in elections of dental hygienists to the Board. The holding of such a license to practice dentistry or dental hygiene in North Carolina shall constitute registration to vote in such elections. The list of licensed dentists and dental hygienists shall constitute the registration list for elections to the appropriate seats on the Board.

(3) All elections shall be conducted by the Board of Dental Examiners which is hereby constituted a Board of Dental Elections. If a member of the Board of Dental Examiners whose position is to be filled at any election is nominated to succeed himself, and does not withdraw his name, he shall be disqualified

to serve as a member of the Board of Dental Elections for that election and the remaining members of the Board of Dental Elections shall proceed and function without his participation.

(4) Nomination of dentists for election shall be made to the Board of Dental Elections by a written petition signed by not less than 10 dentists licensed to practice in North Carolina and residing or practicing in North Carolina. Nomination of dental hygienists for election shall be made to the Board of Dental Elections by a written petition signed by not less than 10 dental hygienists licensed to practice in North Carolina and residing or practicing in North Carolina. Such petitions shall be filed with said Board of Dental Elections subsequent to January 1 of the year in which the election is to be held and not later than midnight of the twentieth day of May of such year, or not later than such earlier date (not before April 1) as may be set by the Board of Dental Elections: provided, that not less than 10 days' notice of such earlier date shall be given to all dentists or dental hygienists qualified to sign a petition of nomination. The Board of Dental Elections shall, before preparing ballots, notify all persons who have been duly nominated of their nomination.

(5) Any person who is nominated as provided in subdivision (4) above may withdraw his name by written notice delivered to the Board of Dental Elections or its designated secretary at any time prior to the closing of the polls in any election.

(6) Following the close of nominations, there shall be prepared, under and in accordance with such rules and regulations as the Board of Dental Elections shall prescribe, ballots containing, in alphabetical

order, the names of all nominees; and each ballot shall have such method of identification, and such instructions and requirements printed thereon, as shall be prescribed by the Board of Dental Elections. At such time as may be fixed by the Board of Dental Elections a ballot and a return official envelope addressed to said Board shall be mailed to each person entitled to vote in the election being conducted, together with a notice by said Board designating the latest day and hour for return mailing and containing such other items as such Board may see fit to include. The said envelope shall bear a serial number and shall have printed on the left portion of its face the following:

"Serial No. of Envelope.....

Signature of Voter .....

Address of Voter .....

(Note: The enclosed ballot is not valid unless the signature of the voter is on this envelope)."

The Board of Dental Elections may cause to be printed or stamped or written on said envelope such additional notice as it may see fit to give. No ballot shall be valid or shall be counted in an election unless, within the time hereinafter provided, it has been delivered to said Board by hand or by mail and shall be sealed. The said Board by rule may make provision for replacement of lost or destroyed envelopes or ballots upon making proper provisions to safeguard against abuse.

(7) The date and hour fixed by the Board of Dental Elections as the latest time for delivery by hand or mailing of said return ballots shall be not earlier

than the tenth day following the mailing of the envelopes and ballots to the voters.

(8) The said ballots shall be canvassed by the Board of Dental Elections beginning at noon on a day and at a place set by said Board and announced by it in the notice accompanying the sending out of the ballots and envelopes, said date to be not later than four days after the date fixed by the Board for the closing of the balloting. The canvassing shall be made publicly and any licensed dentists may be present. The counting of ballots shall be conducted as follows: The envelopes shall be displayed to the persons present and an opportunity shall be given to any person present to challenge the qualification of the voter whose signature appears on the envelope or to challenge the validity of the envelope. Any envelope (with enclosed ballot) challenged shall be set aside, and the challenge shall be heard later or at that time by said Board. After the envelopes have been so exhibited, those not challenged shall be opened and the ballots extracted therefrom, insofar as practicable without showing the marking on the ballots, and there shall be a final and complete separation of each envelope and its enclosed ballot. Thereafter each ballot shall be presented for counting, shall be displayed and, if not challenged, shall be counted. No ballot shall be valid if it is marked for more nominees than there are positions to be filled in that election: provided, that no ballot shall be rejected for any technical error unless it is impossible to determine the voter's choices or choice from the ballot. The counting of the ballots shall be continued until completed. During the counting, challenge may be made to any ballot on the grounds only of defects appearing on the face of the ballot.

The said Board may decide the challenge immediately when it is made or it may put aside the ballot and determine the challenge upon the conclusion of the counting of the ballots.

(9)a. Where there is more than one nominee eligible for election to a single seat:

1. The nominee receiving a majority of the votes cast shall be declared elected.

2. In the event that no nominee receives a majority, a second election shall be conducted between the two nominees who receive the highest number of votes.

b. Where there are more than two nominees eligible for election to either of two seats at issue in the same election:

1. A majority shall be any excess of the sum ascertained by dividing the total number of votes cast for all nominees by four.

2. In the event that more than two nominees receive a majority of the votes cast, the two receiving the highest number of votes shall be declared elected.

3. In the event that only one of the nominees receives a majority, he shall be declared elected and the Board of Dental Examiners shall thereupon order a second election to be conducted between the two nominees receiving the next to highest number of votes.

4. In the event that no nominee receives a majority, a second election shall be conducted between the four candidates receiving the highest number of votes. At such second election, the two nominees receiving the highest number of votes shall be declared elected.

c. In any election, if there is a tie between candidates, the tie shall be resolved by the vote of the Board of Dental Examiners, provided that if a member of that Board is one of the candidates in the tie, he may not participate in such vote.

(10) In the event there shall be required a second election, there shall be followed the same procedure as outlined in the paragraphs above subject to the same limitations and requirements: provided, that if the second election is between four candidates, then the two receiving the highest number of votes shall be declared elected.

(11) In the case of the death or withdrawal of a candidate prior to the closing of the polls in any election, he shall be eliminated from the contest and any votes cast for him shall be disregarded. If, at any time after the closing of the period for nominations because of lack of plural or proper nominations or death, or withdrawal, or disqualification or any other reason, there shall be (i) only two candidates for two positions, they shall be declared elected by the Board of Dental Elections, or (ii) only one candidate for one position, he shall be declared elected by the Board of Dental Elections, or (iii) no candidate for two positions, the two positions shall be filled by the Board of Dental Examiners, or (iv) no candidate for one position, the position shall be filled by the Board of Dental Examiners, or (v) one candidate for two positions, the one candidate shall be declared elected by the Board of Dental Elections and one qualified dentist shall be elected to the other position by the Board of Dental Examiners. In the event of the death or withdrawal of a candidate after election but before taking office, the position to which he was elected

shall be filled by the Board of Dental Examiners. In the event of the death or resignation of a member of the Board of Dental Examiners, after taking office, his position shall be filled for the unexpired term by the Board of Dental Examiners.

(12) An official list of licensed dentists shall be kept at an office of the Board of Dental Elections and shall be open to the inspection of any person at all times. Copies may be made by any licensed dentist. As soon as the voting in any election begins a list of the licensed dentists shall be posted in such office of said Board and indication by mark or otherwise shall be made on that list to show whether a ballot-enclosing envelope has been returned

(13) All envelopes enclosing ballots and all ballots shall be preserved and held separately by the Board of Dental Elections for a period of six months following the close of an election.

(14) From any decision of the Board of Dental Elections relative to the conduct of such elections, appeal may be taken to the courts in the manner otherwise provided by Chapter 150B of the General Statutes of North Carolina.

(15) The Board of Dental Elections is authorized to make rules and regulations relative to the conduct of these elections, provided same are not in conflict with the provisions of this section and provided that notice shall be given to all licensed dentists residing in North Carolina.

(d) For service on the Board of Dental Elections, the members of such Board shall receive the per diem compensation and expenses allowed by this Article for service as members of the Board of Dental Examiners. The Board of Dental Elections is

authorized and empowered to expend from funds collected under the provisions of this Article such sum or sums as it may determine necessary in the performance of its duties as a Board of Dental Elections, said expenditures to be in addition to the authorization contained in G.S. 90-43 and to be disbursed as provided therein.

(e) The Board of Dental Elections is authorized to appoint such secretary or secretaries and/or assistant secretary or assistant secretaries to perform such functions in connection with such nominations and elections as said Board shall determine, provided that any protestant or contestant shall have the right to a hearing by said Board in connection with any challenge of a voter, or an envelope, or a ballot or the counting of an election. Said Board is authorized to designate an office or offices for the keeping of lists of registered dentists, for the issuance and the receipt of envelopes and ballots.

N.C. Gen. Stat. § 90-27 provides:

§ 90-27 Judicial powers; additional data for records

The president of the North Carolina State Board of Dental Examiners, and/or the secretary-treasurer of said Board, shall have the power to administer oaths, issue subpoenas requiring the attendance of persons and the production of papers and records before said Board in any hearing, investigation or proceeding conducted by it. The sheriff or other proper official of any county of the State shall serve the process issued by said president or secretary-treasurer of said Board pursuant to its requirements and in the same manner as process issued by any court of record. The

said Board shall pay for the service of all process, such fees as are provided by law for the service of like process in other cases.

Any person who shall neglect or refuse to obey any subpoena requiring him to attend and testify before said Board or to produce books, records or documents shall be guilty of a Class 1 misdemeanor.

The Board shall have the power, upon the production of any papers, records or data, to authorize certified copies thereof to be substituted in the permanent record of the matter in which such books, records or data shall have been introduced in evidence.

N.C. Gen. Stat. § 90-29 provides:

§ 90-29 Necessity for license; dentistry defined; exemptions

(a) No person shall engage in the practice of dentistry in this State, or offer or attempt to do so, unless such person is the holder of a valid license or certificate of renewal of license duly issued by the North Carolina State Board of Dental Examiners.

(b) A person shall be deemed to be practicing dentistry in this State who does, undertakes or attempts to do, or claims the ability to do any one or more of the following acts or things which, for the purposes of this Article, constitute the practice of dentistry:

(1) Diagnoses, treats, operates, or prescribes for any disease, disorder, pain, deformity, injury, deficiency, defect, or other physical condition of the human teeth, gums, alveolar process, jaws, maxilla,

mandible, or adjacent tissues or structures of the oral cavity;

(2) Removes stains, accretions or deposits from the human teeth;

(3) Extracts a human tooth or teeth;

(4) Performs any phase of any operation relative or incident to the replacement or restoration of all or a part of a human tooth or teeth with any artificial substance, material or device;

(5) Corrects the malposition or malformation of the human teeth;

(6) Administers an anesthetic of any kind in the treatment of dental or oral diseases or physical conditions or in preparation for or incident to any operation within the oral cavity; provided, however, that this subsection shall not apply to a lawfully qualified nurse anesthetist who administers such anesthetic under the supervision and direction of a licensed dentist or physician;

(6a) Expired July 1, 1996.

(7) Takes or makes an impression of the human teeth, gums or jaws;

(8) Makes, builds, constructs, furnishes, processes, reproduces, repairs, adjusts, supplies or professionally places in the human mouth any prosthetic denture, bridge, appliance, corrective device, or other structure designed or constructed as a substitute for a natural human tooth or teeth or as an aid in the treatment of the malposition or malformation of a tooth or teeth, except to the extent the same may lawfully be performed in accordance with the provisions of G.S. 90-29.1 and 90-29.2;

(9) Uses a Roentgen or X-ray machine or device for dental treatment or diagnostic purposes, or gives interpretations or readings of dental Roentgenograms or X rays;

(10) Performs or engages in any of the clinical practices included in the curricula of recognized dental schools or colleges;

(11) Owns, manages, supervises, controls or conducts, either himself or by and through another person or other persons, any enterprise wherein any one or more of the acts or practices set forth in subdivisions (1) through (10) above are done, attempted to be done, or represented to be done;

(12) Uses, in connection with his name, any title or designation, such as "dentist," "dental surgeon," "doctor of dental surgery," "D.D.S.," "D.M.D.," or any other letters, words or descriptive matter which, in any manner, represents him as being a dentist able or qualified to do or perform any one or more of the acts or practices set forth in subdivisions (1) through (10) above;

(13) Represents to the public, by any advertisement or announcement, by or through any media, the ability or qualification to do or perform any of the acts or practices set forth in subdivisions (1) through (10) above.

(c) The following acts, practices, or operations, however, shall not constitute the unlawful practice of dentistry:

(1) Any act by a duly licensed physician or surgeon performed in the practice of his profession;

(2) The practice of dentistry, in the discharge of their official duties, by dentists in any branch of the

Armed Forces of the United States or in the full-time employ of any agency of the United States;

(3) The teaching or practice of dentistry, in dental schools or colleges operated and conducted in this State and approved by the North Carolina State Board of Dental Examiners, by any person or persons licensed to practice dentistry anywhere in the United States or in any country, territory or other recognized jurisdiction until December 31, 2002. On or after January 1, 2003, all dentists previously practicing under G.S. 90-29(c)(3) shall be granted an instructor's license upon application to the Board and payment of the required fee.

(4) The practice of dentistry in dental schools or colleges in this State approved by the North Carolina State Board of Dental Examiners by students enrolled in such schools or colleges as candidates for a doctoral degree in dentistry when such practice is performed as a part of their course of instruction and is under direct supervision of a dentist who is either duly licensed in North Carolina or qualified under subdivision (3) above as a teacher; additionally, the practice of dentistry by such students at State or county institutions with resident populations, hospitals, State or county health departments, area health education centers, nonprofit health care facilities serving low-income populations and approved by the State Health Director or his designee and approved by the Board of Dental Examiners, and State or county-owned nursing homes; subject to review and approval or disapproval by the said Board of Dental Examiners when in the opinion of the dean of such dental school or college or his designee, the students' dental education and experience are

adequate therefor, and such practice is a part of the course of instruction of such students, is performed under the direct supervision of a duly licensed dentist acting as a teacher or instructor, and is without remuneration except for expenses and subsistence all as defined and permitted by the rules and regulations of said Board of Dental Examiners. Should the Board disapprove a specific program, the Board shall within 90 days inform the dean of its actions. Nothing herein shall be construed to permit the teaching of, delegation to or performance by any dental hygienist, dental assistant, or other auxiliary relative to any program of extramural rotation, of any function not heretofore permitted by the Dental Practice Act, the Dental Hygiene Act or by the rules and regulations of the Board;

(5) The temporary practice of dentistry by licensed dentists of another state or of any territory or country when the same is performed, as clinicians, at meetings of organized dental societies, associations, colleges or similar dental organizations, or when such dentists appear in emergency cases upon the specific call of a dentist duly licensed to practice in this State;

(6) The practice of dentistry by a person who is a graduate of a dental school or college approved by the North Carolina State Board of Dental Examiners and who is not licensed to practice dentistry in this State, when such person is the holder of a valid intern permit, or provisional license, issued to him by the North Carolina State Board of Dental Examiners pursuant to the terms and provisions of this Article, and when such practice of dentistry complies with the conditions of said intern permit, or provisional license;

(7) Any act or acts performed by a dental hygienist when such act or acts are lawfully performed pursuant to the authority of Article 16 of this Chapter 90 or the rules and regulations of the Board promulgated thereunder;

(8) Activity which would otherwise be considered the practice of dental hygiene performed by students enrolled in a school or college approved by the Board in a board-approved dental hygiene program under the direct supervision of a dental hygienist or a dentist duly licensed in North Carolina or qualified for the teaching of dentistry pursuant to the provisions of subdivision (3) above;

(9) Any act or acts performed by an assistant to a dentist licensed to practice in this State when said act or acts are authorized and permitted by and performed in accordance with rules and regulations promulgated by the Board;

(10) Dental assisting and related functions as a part of their instructions by students enrolled in a course in dental assisting conducted in this State and approved by the Board, when such functions are performed under the supervision of a dentist acting as a teacher or instructor who is either duly licensed in North Carolina or qualified for the teaching of dentistry pursuant to the provisions of subdivision (3) above;

(11) The extraoral construction, manufacture, fabrication or repair of prosthetic dentures, bridges, appliances, corrective devices, or other structures designed or constructed as a substitute for a natural human tooth or teeth or as an aid in the treatment of the malposition or malformation of a tooth or teeth, by a person or entity not licensed to practice

dentistry in this State, when the same is done or performed solely upon a written work order in strict compliance with the terms, provisions, conditions and requirements of G.S. 90-29.1 and 90-29.2.

(12) The use of a dental x-ray machine in the taking of dental radiographs by a dental hygienist, certified dental assistant, or a dental assistant who can show evidence of satisfactory performance on an equivalency examination, recognized by the Board of Dental Examiners, based on seven hours of instruction in the production and use of dental x rays and an educational program of not less than seven hours in clinical dental radiology.

(13) A dental assistant, or dental hygienist who shows evidence of education and training in Nitrous Oxide — Oxygen Inhalant Conscious Sedation within a formal educational program may aid and assist a licensed dentist in the administration of Nitrous Oxide — Oxygen Inhalant Conscious Sedation. Any dental assistant who can show evidence of having completed an educational program recognized by the Board of not less than seven clock hours on Nitrous Oxide — Oxygen Inhalant Conscious Sedation may also aid and assist a licensed dentist in the administration of Nitrous Oxide — Oxygen Inhalant Conscious Sedation. Any dental hygienist or dental assistant who has been employed in a dental office where Nitrous Oxide — Oxygen Inhalant Conscious Sedation was utilized, and who can show evidence of performance and instruction of not less than one year prior to July 1, 1980, qualifies to aid and assist a licensed dentist in the administration of Nitrous Oxide — Oxygen Inhalant Conscious Sedation.

(14) The operation of a nonprofit health care facility serving low-income populations and approved by the State Health Director or his designee and approved by the North Carolina State Board of Dental Examiners.

N.C. Gen. Stat. § 90-30 provides:

§ 90-30 Examination and licensing of applicants; qualifications; causes for refusal to grant license; void licenses

(a) The North Carolina State Board of Dental Examiners shall grant licenses to practice dentistry to such applicants who are graduates of a reputable dental institution, who, in the opinion of a majority of the Board, shall undergo a satisfactory examination of proficiency in the knowledge and practice of dentistry, subject, however, to the further provisions of this section and of the provisions of this Article.

The applicant for a license to practice dentistry shall be of good moral character, at least 18 years of age at the time the application is filed. The application for a dental license shall be made to the Board in writing and shall be accompanied by evidence satisfactory to the Board that the applicant is a person of good moral character, has an academic education, the standard of which shall be determined by the Board; that the applicant is a graduate of and has a diploma from a reputable dental college or the dental department of a reputable university or college recognized, accredited and approved as such by the Board; and that the applicant has passed a clinical licensing examination, the standard of which shall be determined by the Board.

The North Carolina State Board of Dental Examiners is authorized to conduct both written or oral and clinical examinations or to accept the results of other Board-approved regional or national independent third-party clinical examinations that shall include procedures performed on human subjects as part of the assessment of restorative clinical competencies and that are determined by the Board to be of such character as to thoroughly test the qualifications of the applicant, and may refuse to grant a license to any person who, in its discretion, is found deficient in the examination. The Board may refuse to grant a license to any person guilty of cheating, deception or fraud during the examination, or whose examination discloses to the satisfaction of the Board, a deficiency in academic or clinical education. The Board may employ such dentists found qualified therefor by the Board, in examining applicants for licenses as it deems appropriate.

The North Carolina State Board of Dental Examiners may refuse to grant a license to any person guilty of a crime involving moral turpitude, or gross immorality, or to any person addicted to the use of alcoholic liquors or narcotic drugs to such an extent as, in the opinion of the Board, renders the applicant unfit to practice dentistry.

Any license obtained through fraud or by any false representation shall be void ab initio and of no effect.

(b) The Department of Justice may provide a criminal record check to the North Carolina State Board of Dental Examiners for a person who has applied for a license through the Board. The Board shall provide to the Department of Justice, along with the request, the fingerprints of the applicant,

any additional information required by the Department of Justice, and a form signed by the applicant consenting to the check of the criminal record and to the use of the fingerprints and other identifying information required by the State or national repositories. The applicant's fingerprints shall be forwarded to the State Bureau of Investigation for a search of the State's criminal history record file, and the State Bureau of Investigation shall forward a set of the fingerprints to the Federal Bureau of Investigation for a national criminal history check. The Board shall keep all information pursuant to this subsection privileged, in accordance with applicable State law and federal guidelines, and the information shall be confidential and shall not be a public record under Chapter 132 of the General Statutes.

The Department of Justice may charge each applicant a fee for conducting the checks of criminal history records authorized by this subsection

N.C. Gen. Stat. § 90-40 provides:

§ 90-40 Unauthorized practice; penalty

If any person shall practice or attempt to practice dentistry in this State without first having passed the examination and obtained a license from the North Carolina Board of Dental Examiners or having obtained a provisional license from said Board; or if he shall practice dentistry after March 31 of each year without applying for a certificate of renewal of license, as provided in G.S. 90-31; or shall practice or attempt to practice dentistry while his license is revoked, or suspended, or when a certificate of renewal of license has been refused; or shall violate

any of the provisions of this Article for which no specific penalty has been provided; or shall practice or attempt to practice, dentistry in violation of the provisions of this Article; or shall practice dentistry under any name other than his own name, said person shall be guilty of a Class 1 misdemeanor. Each day's violation of this Article shall constitute a separate offense.

N.C. Gen. Stat. § 90-40.1 provides:

§ 90-40.1 Enjoining unlawful acts

(a) The practice of dentistry by any person who has not been duly licensed so as to practice or whose license has been suspended or revoked, or the doing, committing or continuing of any of the acts prohibited by this Article by any person or persons, whether licensed dentists or not, is hereby declared to be inimical to public health and welfare and to constitute a public nuisance. The Attorney General for the State of North Carolina, the district attorney of any of the superior courts, the North Carolina State Board of Dental Examiners in its own name, or any resident citizen may maintain an action in the name of the State of North Carolina to perpetually enjoin any person from so unlawfully practicing dentistry and from the doing, committing or continuing of such unlawful act. This proceeding shall be in addition to and not in lieu of criminal prosecutions or proceedings to revoke or suspend licenses as authorized by this Article.

(b) In an action brought under this section the final judgment, if in favor of the plaintiff, shall perpetually restrain the defendant or defendants from the commission or continuance of the act or acts

complained of. A temporary injunction to restrain the commission or continuance thereof may be granted upon proof or by affidavit that the defendant or defendants have violated any of the laws or statutes applicable to unauthorized or unlawful practice of dentistry. The provisions of the statutes or rules relating generally to injunctions as provisional remedies in actions shall apply to such a temporary injunction and the proceedings thereunder.

(c) The venue for actions brought under this section shall be the superior court of any county in which such acts constituting unlicensed or unlawful practice of dentistry are alleged to have been committed or in which there appear reasonable grounds to believe that they will be committed, in the county where the defendants in such action reside, or in Wake County.

(d) The plaintiff in such action shall be entitled to examination of the adverse party and witnesses before filing complaint and before trial in the same manner as provided by law for the examination of the parties.

N.C. Gen. Stat. § 90-41 provides:

§ 90-41 Disciplinary action

(a) The North Carolina State Board of Dental Examiners shall have the power and authority to (i) Refuse to issue a license to practice dentistry; (ii) Refuse to issue a certificate of renewal of a license to practice dentistry; (iii) Revoke or suspend a license to practice dentistry; and (iv) Invoke such other

disciplinary measures, censure, or probative terms against a licensee as it deems fit and proper;

in any instance or instances in which the Board is satisfied that such applicant or licensee:

(1) Has engaged in any act or acts of fraud, deceit or misrepresentation in obtaining or attempting to obtain a license or the renewal thereof;

(2) Is a chronic or persistent user of intoxicants, drugs or narcotics to the extent that the same impairs his ability to practice dentistry;

(3) Has been convicted of any of the criminal provisions of this Article or has entered a plea of guilty or nolo contendere to any charge or charges arising therefrom;

(4) Has been convicted of or entered a plea of guilty or nolo contendere to any felony charge or to any misdemeanor charge involving moral turpitude;

(5) Has been convicted of or entered a plea of guilty or nolo contendere to any charge of violation of any state or federal narcotic or barbiturate law;

(6) Has engaged in any act or practice violative of any of the provisions of this Article or violative of any of the rules and regulations promulgated and adopted by the Board, or has aided, abetted or assisted any other person or entity in the violation of the same;

(7) Is mentally, emotionally, or physically unfit to practice dentistry or is afflicted with such a physical or mental disability as to be deemed dangerous to the health and welfare of his patients. An adjudication of mental incompetency in a court of competent jurisdiction or a determination thereof by other lawful means shall be conclusive proof of unfitness to practice dentistry unless or until such person shall

have been subsequently lawfully declared to be mentally competent;

(8) Has conducted in-person solicitation of professional patronage or has employed or procured any person to conduct such solicitation by personal contact with potential patients, except to the extent that informal advice may be permitted by regulations issued by the Board of Dental Examiners;

(9) Has permitted the use of his name, diploma or license by another person either in the illegal practice of dentistry or in attempting to fraudulently obtain a license to practice dentistry;

(10) Has engaged in such immoral conduct as to discredit the dental profession;

(11) Has obtained or collected or attempted to obtain or collect any fee through fraud, misrepresentation, or deceit;

(12) Has been negligent in the practice of dentistry;

(13) Has employed a person not licensed in this State to do or perform any act or service, or has aided, abetted or assisted any such unlicensed person to do or perform any act or service which under this Article or under Article 16 of this Chapter, can lawfully be done or performed only by a dentist or a dental hygienist licensed in this State;

(14) Is incompetent in the practice of dentistry;

(15) Has practiced any fraud, deceit or misrepresentation upon the public or upon any individual in an effort to acquire or retain any patient or patients;

(16) Has made fraudulent or misleading statements pertaining to his skill, knowledge, or method of treatment or practice;

(17) Has committed any fraudulent or misleading acts in the practice of dentistry;

(18) Has, directly or indirectly, published or caused to be published or disseminated any advertisement for professional patronage or business which is untruthful, fraudulent, misleading, or in any way inconsistent with rules and regulations issued by the Board of Dental Examiners governing the time, place, or manner of such advertisements;

(19) Has, in the practice of dentistry, committed an act or acts constituting malpractice;

(20) Repealed by Laws 1981, c. 751, § 7.

(21) Has permitted a dental hygienist or a dental assistant in his employ or under his supervision to do or perform any act or acts violative of this Article, or of Article 16 of this Chapter, or of the rules and regulations promulgated by the Board;

(22) Has wrongfully or fraudulently or falsely held himself out to be or represented himself to be qualified as a specialist in any branch of dentistry;

(23) Has persistently maintained, in the practice of dentistry, unsanitary offices, practices, or techniques;

(24) Is a menace to the public health by reason of having a serious communicable disease;

(25) Has distributed or caused to be distributed any intoxicant, drug or narcotic for any other than a lawful purpose; or

(26) Has engaged in any unprofessional conduct as the same may be, from time to time, defined by the rules and regulations of the Board.

(b) If any person engages in or attempts to engage in the practice of dentistry while his license is suspended, his license to practice dentistry in the State of North Carolina may be permanently revoked.

(c) The Board may, on its own motion, initiate the appropriate legal proceedings against any person, firm or corporation when it is made to appear to the Board that such person, firm or corporation has violated any of the provisions of this Article or of Article 16.

(d) The Board may appoint, employ or retain an investigator or investigators for the purpose of examining or inquiring into any practices committed in this State that might violate any of the provisions of this Article or of Article 16 or any of the rules and regulations promulgated by the Board.

(e) The Board may employ or retain legal counsel for such matters and purposes as may seem fit and proper to said Board.

(f) As used in this section the term "licensee" includes licensees, provisional licensees and holders of intern permits, and the term "license" includes license, provisional license, instructor's license, and intern permit.

(g) Records, papers, and other documents containing information collected or compiled by the Board, or its members or employees, as a result of investigations, inquiries, or interviews conducted in connection with a licensing or disciplinary matter, shall not be

considered public records within the meaning of Chapter 132 of the General Statutes; provided, however, that any notice or statement of charges against any licensee, or any notice to any licensee of a hearing in any proceeding, shall be a public record within the meaning of Chapter 132 of the General Statutes, notwithstanding that it may contain information collected and compiled as a result of any investigation, inquiry, or interview; and provided, further, that if any record, paper, or other document containing information collected and compiled by the Board is received and admitted into evidence in any hearing before the Board, it shall then be a public record within the meaning of Chapter 132 of the General Statutes.

N.C. Gen. Stat. § 90-48 provides:

§ 90-48 Rules and regulations of Board; violation a misdemeanor

The North Carolina State Board of Dental Examiners shall be and is hereby vested, as an agency of the State, with full power and authority to enact rules and regulations governing the practice of dentistry within the State, provided such rules and regulations are not inconsistent with the provisions of this Article. Such rules and regulations shall become effective 30 days after passage, and the same may be proven, as evidence, by the president and/or the secretary-treasurer of the Board, and/or by certified copy under the hand and official seal of the secretary-treasurer. A certified copy of any rule or regulation shall be receivable in all courts as prima facie evidence thereof if otherwise competent, and any person, firm, or corporation violating any such

rule, regulation, or bylaw shall be guilty of a Class 2 misdemeanor, and each day that this section is violated shall be considered a separate offense.

The Board shall issue every two years to each licensed dentist a compilation or supplement of the Dental Practice Act and the Board rules and regulations, and upon written request therefor by such licensed dentist, a directory of dentists.

N.C. Gen. Stat. § 93B-1 provides:

§ 93B-1 Definitions

As used in this Chapter:

"License" means any license (other than a privilege license), certificate, or other evidence of qualification which an individual is required to obtain before he may engage in or represent himself to be a member of a particular profession or occupation.

"Occupational licensing board" means any board, committee, commission, or other agency in North Carolina which is established for the primary purpose of regulating the entry of persons into, and/or the conduct of persons within, a particular profession or occupation, and which is authorized to issue licenses; "occupational licensing board" does not include State agencies, staffed by full-time State employees, which as a part of their regular functions may issue licenses.

N.C. Gen. Stat. § 93B-2 provides:

§ 93B-2 Annual reports required; contents; open to inspection; sanction for failure to report

(a) No later than October 31 of each year, each occupational licensing board shall file with the Secretary of State, the Attorney General, and the Joint Regulatory Reform Committee an annual report containing all of the following information:

(1) The address of the board, and the names of its members and officers.

(2) The number of persons who applied to the board for examination.

(3) The number who were refused examination.

(4) The number who took the examination.

(5) The number to whom initial licenses were issued.

(6) The number who applied for license by reciprocity or comity.

(7) The number who were granted licenses by reciprocity or comity.

(7a) The number of official complaints received involving licensed and unlicensed activities.

(7b) The number of disciplinary actions taken against licensees, or other actions taken against nonlicensees, including injunctive relief.

(8) The number of licenses suspended or revoked.

(9) The number of licenses terminated for any reason other than failure to pay the required renewal fee.

(10) The substance of any anticipated request by the occupational licensing board to the General Assembly to amend statutes related to the occupational licensing board.

(11) The substance of any anticipated change in rules adopted by the occupational licensing board or the substance of any anticipated adoption of new rules by the occupational licensing board.

(b) No later than October 31 of each year, each occupational licensing board shall file with the Secretary of State, the Attorney General, the Office of State Budget and Management, and the Joint Regulatory Reform Committee a financial report that includes the source and amount of all funds credited to the occupational licensing board and the purpose and amount of all funds disbursed by the occupational licensing board during the previous fiscal year.

(c) The reports required by this section shall be open to public inspection.

(d) Failure of a board to comply with the reporting requirements of this section by October 31 of each year shall result in a suspension of the board's authority to expend any funds until such time as the board files the required reports. Suspension of a board's authority to expend funds under this subsection shall not affect the board's duty to issue and renew licenses or the validity of any application or license for which fees have been tendered in accordance with law. Each board shall adopt rules establishing a procedure for implementing this subsection and shall maintain an escrow account into which any fees tendered during a board's period of suspension under this subsection shall be deposited.

N.C. Gen. Stat. § 93B-5 provides:

§ 93B-5 Compensation, employment, and training of board members

(a) Board members shall receive as compensation for their services per diem not to exceed one hundred dollars ($100.00) for each day during which they are engaged in the official business of the board.

(b) Board members shall be reimbursed for all necessary travel expenses in an amount not to exceed that authorized under G.S. 138-6(a) for officers and employees of State departments. Actual expenditures of board members in excess of the maximum amounts set forth in G.S. 138-6(a) for travel and subsistence may be reimbursed if the prior approval of the State Director of Budget is obtained and such approved expenditures are within the established and published uniform standards and criteria of the State Director of Budget authorized under G.S. 138-7 for extraordinary charges for hotels, meals, and convention registration for State officers and employees, whenever such charges are the result of required official business of the Board.

(c) Repealed by Laws 1981, c. 757, § 2.

(d) Except as provided herein board members shall not be paid a salary or receive any additional compensation for services rendered as members of the board.

(e) Board members shall not be permanent, salaried employees of said board.

(f) Repealed by Laws 1975, c. 765, § 1.

(g) Within six months of a board member's initial appointment to the board, and at least once within every two calendar years thereafter, a board member

shall receive training, either from the board's staff, including its legal advisor, or from an outside educational institution such as the School of Government of the University of North Carolina, on the statutes governing the board and rules adopted by the board, as well as the following State laws, in order to better understand the obligations and limitations of a State agency:

(1) Chapter 150B, The Administrative Procedure Act.

(2) Chapter 132, The Public Records Law.

(3) Article 33C of Chapter 143, The Open Meetings Act.

(4) Articles 31 and 31A of Chapter 143, The State Tort Claims Act and The Defense of State Employees Law.

(5) Chapter 138A, The State Government Ethics Act.

(6) Chapter 120C, Lobbying.

Completion of the training requirements contained in Chapter 138A and Chapter 120C of the General Statutes satisfies the requirements of subdivisions (5) and (6) of this subsection.

N.C. Gen. Stat. § 120-70.101 provides:

§ 120-70.101 Purpose and powers of Committees

The Joint Legislative Administrative Procedure Oversight Committee has the following powers and duties:

(1) To review rules to which the Rules Review Commission has objected to determine if statutory

changes are needed to enable the agency to fulfill the intent of the General Assembly.

(2) To receive reports prepared by the Rules Review Commission containing the text and a summary of each rule approved by the Commission.

(3) Deleted by S.L. 2009-125, § 1, eff. Oct. 1, 2009.

(3a) To review the activities of State occupational licensing boards to determine if the boards are operating in accordance with statutory requirements and if the boards are still necessary to achieve the purposes for which they were created. This review shall not include decisions concerning board personnel matters or determinations on individual licensing applications or individual disciplinary actions.

(4) To review State regulatory programs to determine if the programs overlap, have conflicting goals, or could be simplified and still achieve the purpose of the regulation.

(5) To review existing rules to determine if the rules are necessary or if the rules can be streamlined.

(6) To review the rule-making process to determine if the procedures for adopting rules give the public adequate notice of and information about proposed rules.

(7) To review any other concerns about administrative law to determine if statutory changes are needed.

(8) To report to the General Assembly from time to time concerning the Committee's activities and any recommendations for statutory changes.

OPPOSITION BRIEF

No. 13-534

In the Supreme Court of the United States

NORTH CAROLINA BOARD OF DENTAL EXAMINERS,
PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Petitioner is a multi-member board that exercises certain authority over the practice of dentistry in North Carolina. Most of its members are dentists who compete in the market for teeth-whitening services and who are elected by other dentists. In a determination upheld by the court of appeals and not challenged here, the Federal Trade Commission (FTC) concluded that petitioner had engaged in concerted anticompetitive conduct that had the effect of expelling the dentists' would-be competitors from the market for teeth-whitening services. The question presented is as follows:

Whether the court of appeals correctly upheld the FTC's determination that the state action doctrine did not exempt petitioner's actions from federal antitrust scrutiny.

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In the Supreme Court of the United States

No. 13-534

NORTH CAROLINA BOARD OF DENTAL EXAMINERS, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) is reported at 717 F.3d 359. An opinion of the Federal Trade Commission (Pet. App. 34a-68a) is reported at 151 F.T.C. 607. Another opinion and order of the Federal Trade Commission (Pet. App. 69a-155a) is not yet published in the *Federal Trade Commission Decisions* but is available at 2011 WL 6229615. The initial decision of the administrative law judge is not reproduced in the appendix to the petition for a writ of certiorari and is not yet published in the *Federal Trade Commission Decisions* but is available at 2011 WL 3152198.

JURISDICTION

The judgment of the court of appeals was entered on May 31, 2013. A petition for rehearing was denied on July 30, 2013 (Pet. App. 156a-157a). The petition for a

writ of certiorari was filed on October 25, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Petitioner, the North Carolina State Board of Dental Examiners, is denominated an "agency of the state" under North Carolina law and is tasked with enforcing North Carolina's Dental Practice Act (DPA), N.C. Gen. Stat. §§ 90-22 *et seq.* The DPA governs, *inter alia*, the licensing of dentists and their professional conduct. N.C. Gen. Stat. § 90-30; Pet. App. 40a. Petitioner is funded exclusively by private licensees' dues and fees. *Id.* at 5a, 72a.

Petitioner's constituent members are private actors. Those members include six licensed dentists, who are elected directly by other licensed dentists to three-year renewable terms; one licensed dental hygienist, who is elected by other licensed hygienists to a three-year renewable term; and one consumer member, who is appointed by the Governor of North Carolina to a three-year renewable term. N.C. Gen. Stat. § 90-22(b); Pet. App. 40a. Because the six dentist-members must be active practitioners while they serve, each has a significant financial interest in the business of the profession. *Id.* at 72a.

Petitioner's principal activity is the licensing and disciplining of dentists and other dental professionals in the practice of dentistry. Pet. App. 5a, 72a.[1] In contrast to its authority over licensees and license applicants, see

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[1] The DPA provides that a person "shall be deemed to be practicing dentistry" by undertaking, or attempting, any of the actions listed in the statute. See N.C. Gen. Stat. § 90-29(b)(1)-(13); see *id.* § 90-29-(c)(1)-(14) (listing acts that "shall not constitute the unlawful practice of dentistry").

N.C. Gen. Stat. §§ 90-27, 90-41.1, petitioner is not authorized under state law to discipline unlicensed persons directly, or to order non-licensees to cease alleged violations of the DPA, such as the unlawful practice of dentistry. Pet. App. 5a-6a, 73a; see *In re North Carolina Board of Dental Examiners* 2011 WL 3152198, at *13 (FTC ALJ Jul. 14, 2011) (*Initial Decision Findings*). Rather, petitioner must institute in state court "an action * * * to perpetually enjoin any person from so unlawfully practicing dentistry." N.C. Gen. Stat. § 90-40.1(a); Pet. App. 5a. State prosecutors and private citizens may also institute such actions. *Ibid.*

Each of petitioner's dentist-members must submit an annual disclosure listing his assets, liabilities, professional affiliations, and business engagements (other than dentistry) and certifying that he is currently practicing dentistry. N.C. Gen. Stat. § 138A-22(a); Pet. App. 41a. Petitioner must submit to certain state executive officials and a state legislative body an annual report providing, *inter alia*, aggregate information on the number and disposition of its investigations. N.C. Gen. Stat. § 93B-2; Pet. App. 41a. The legislative body, North Carolina's Joint Legislative Administrative Procedure Oversight Committee, has the power to "review the activities of the State occupational licensing boards to determine if the boards are operating in accordance with statutory requirements." N.C. Gen. Stat. § 120-70.101(3a); Pet. App. 41a. Petitioner must also comply with North Carolina's Public Records Act (N.C. Gen. Stat. §§ 132-1 *et seq.*), Administrative Procedure Act (*id.* §§ 150B-1 *et seq.*), and open meetings law (*id.* §§ 143-318.9 *et seq.*). Pet. App. 41a.

b. Peroxide-based teeth whitening is one of the most popular cosmetic dental services in North Carolina. It is

available from dentists as an in-office treatment or take-home kit; from retail stores selling over-the-counter products directly to consumers; and from non-dentists at salons, malls, and similar locations. Although all these methods employ peroxide, they vary in their price, the immediacy of their results, their ease of use, the necessity of repeated application, and their need for technical or professional support. Dentists' in-office services are generally quick and effective, typically providing results in a single visit, but are the most costly alternative. Over-the-counter products are the least expensive, but their efficacy can vary because they require diligent and repeated application by consumers. The services of non-dentist providers generally occupy an intermediate level—in terms of cost, convenience, and efficacy—between dentists' in-office services and over-the-counter products. Pet. App. 6a, 70a, 73a-74a.

In approximately 2003, growing demand for teeth-whitening services led non-dentist providers to enter the North Carolina market for such services. Pet. App. 6a, 70a. Soon thereafter, petitioner began to receive complaints from its dentist licensees regarding teeth-whitening service offerings by non-dentists at spas, salons, and trade shows. *Id.* at 6a, 75a. Many complainants noted that the prices of those offerings undercut the prices of the services they offered; few complainants referred to any consumer harm. *Id.* at 70a, 75a.

In response to the dentists' complaints, petitioner sent dozens of cease-and-desist orders to non-dentist providers of teeth-whitening services. Pet. App. 6a-7a, 42a, 76a. Those orders induced many of the providers who received them to leave that market. *Id.* at 7a, 42a, 77a. Petitioner's campaign also targeted entities that did business with non-dentist providers of teeth-whitening

services, such as shopping malls that leased space to teeth-whitening kiosks, and manufacturers and distributors of teeth-whitening products used by non-dentists. *Id.* at 7a, 77a.

2. The Federal Trade Commission (FTC or Commission) filed an administrative complaint that charged petitioner with violating Section 5 of the Federal Trade Commission Act (FTC Act), 15 U.S.C. 45, by anticompetitively excluding non-dentist providers from the market for teeth-whitening services in North Carolina.

a. Petitioner moved to dismiss the complaint, asserting that its actions were exempt from federal competition law under the state action doctrine. The FTC denied that motion, applying the two-part test announced in *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). Under *Midcal*, private actors are exempt from federal antitrust laws if (1) they are implementing a policy judgment that is "clearly articulated and affirmatively expressed as state policy" and (2) their conduct is "actively supervised by the State itself." *Id.* at 105 (quoting *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978) (opinion of Brennan, J.)). Those requirements are "close[ly] relat[ed]" in that both seek assurance that "particular anticompetitive mechanisms operate because of a deliberate and intended state policy." *FTC* v. *Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992). Although the FTC found that substantial questions existed here under the "clear articulation" element of the test—such as whether petitioner was authorized to issue extra-judicial cease-and-desist orders and whether the teeth-whitening methods at issue constitute the practice of dentistry—the Commission assumed without deciding that petitioner's conduct satisfied the "clear articulation" element.

Pet. App. 47a n.8. The FTC focused instead on the "active state supervision" requirement.

The FTC first rejected petitioner's contention that petitioner need not show active supervision at all. Pet. App. 49a-50a. The Commission acknowledged this Court's holding that "the active supervision requirement * * * does not apply to political subdivisions of the State such as municipalities." *Id.* at 49a (citing *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34 (1985) (*Hallie*)). The FTC noted, however, that the Court "has been explicit in applying the antitrust laws to public/private hybrid entities, such as regulatory bodies consisting of market participants." *Id.* at 49a-50a (citing *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975)). Surveying this Court's decisions, the FTC stated that "the operative factor" in determining whether the active-supervision requirement applies to a particular regulatory body is the "tribunal's degree of confidence that the entity's decision-making process is sufficiently independent from the interests of those being regulated" by the entity. *Id.* at 49a. The FTC further noted that decisions of several courts of appeals supported the view that governmental bodies composed of financially interested members must satisfy the active-supervision requirement to qualify for the state action exemption. *Id.* at 51a-52a.

The FTC found that petitioner has an "obvious interest in the challenged restraint," Pet. App. 36a, because "the decisive majority of [petitioner's members] * * * earns a living by practicing dentistry," *id.* at 35a.[2] The

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[2] Petitioner's own expert economist later adopted this view during the trial on the merits, Pet. App. 97a & n.12, and the Commission ultimately found that at least eight of the ten Board members who served between 2005 and 2010 provided teeth-whitening

FTC concluded on that basis that "the state must actively supervise [petitioner] in order for [petitioner] to claim state action protection." *Id.* at 36a.

The FTC found the necessary supervision lacking. Pet. App. 65a. It explained that, under this Court's decisions, the State must actually "*exercise* ultimate control over the challenged anticompetitive conduct," and the "mere presence of some state involvement or monitoring does not suffice." *Id.* at 62a (quoting *Patrick* v. *Burget*, 486 U.S. 94, 101 (1988)) (emphasis added by FTC). The Commission found no evidence that any arm of the State had developed a record or rendered a decision on whether petitioner's challenged conduct comported with state policy. *Id.* at 63a. Petitioner had relied in part on statutory reporting obligations and ethical requirements, but the FTC found those to be insufficient "generic oversight." *Id.* at 64a. The Commission reasoned that none of those provisions "suggest[s] that a state actor was even aware of [petitioner's] policy toward non-dentist teeth whitening, let alone reviewed or approved it in fulfillment of the active supervision requirement." *Id.* at 65a.

b. After petitioner's motion to dismiss on state action grounds was denied, an administrative law judge (ALJ) conducted a hearing to address the merits of the FTC's administrative complaint. The ALJ concluded that concerted action by petitioner to exclude non-dentists from the market for teeth-whitening services in North Carolina constituted an unreasonable restraint of trade and an unfair method of competition in violation of the FTC Act. *Initial Decision Findings*, 2011 WL 3152198, at *7. The ALJ determined, *inter alia*, that, although state law

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services in their private practices, sometimes earning substantial revenues from such services, see *id.* at 96a-97a.

authorizes petitioner to seek appropriate judicial relief (see pp. 2-3, *supra*), petitioner "has no authority over non-dentists" and "does not have the legal authority to order anyone to stop" practicing dentistry. *Id.* at *13.

Petitioner appealed, and the FTC reviewed the record *de novo*. In a ruling on the merits not challenged in this Court, the FTC agreed with the ALJ that petitioner had violated Section 5 of the FTC Act. Pet. App. 87a, 104a. The FTC ordered petitioner not to unilaterally issue extra-judicial cease-and-desist orders against non-dentist providers of teeth-whitening services. *Id.* at 145a-148a. The FTC's order, however, expressly preserves petitioner's authority to threaten litigation and to file court actions for suspected violations of the DPA. *Id.* at 147a-148a.[3]

3. The court of appeals denied petitioner's petition for review. Pet. App. 1a-33a. As relevant here, the court agreed with the FTC that, given the composition of petitioner's membership, petitioner must satisfy both the clear-articulation and active-supervision requirements of *Midcal* in order to establish its exemption from federal competition law. *Id.* at 17a. The court began with this Court's recent reaffirmation that, even in the absence of active supervision, "municipalities and 'substate governmental entities do receive immunity from antitrust scrutiny when they act pursuant to state policy to displace competition with regulation or monopoly public

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[3] The distinction between petitioner's "orders" and mere threats of litigation is critical here, as in many contexts. In *Sackett* v. *EPA*, 132 S. Ct. 1367, 1371-1372 (2012), for example, this Court recognized that the issuance of an administrative "order" generally connotes the imposition of some "legal obligation" in a way the mere articulation of a legal position in a demand letter sent as a prelude to judicial action would not.

service.'" *Id.* at 10a-11a (quoting *FTC* v. *Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1010 (2013))

The court of appeals noted this Court's statement in *Hallie* that a state agency "likely" would not be required to show active supervision, but that "[w]here state or municipal regulation by a private party is involved * * * , active state supervision must be shown, even where a clearly articulated state policy exists." Pet. App. 11a n.4 (quoting 471 U.S. at 46 n.10). Relying on the first half of that statement, petitioner argued that, because North Carolina law characterizes petitioner as an "agency of the state," petitioner need not show active supervision. *Ibid.* The court of appeals rejected that argument. The court explained that, under *Hallie*, *supra*; *Goldfarb*, *supra*; and *Southern Motor Carriers Rate Conference, Inc.* v. *United* States, 471 U.S. 48, 57 (1985), a particular entity designated as a "state agency" may still be required to show active supervision "where the 'state agency' is composed entirely of private market participants." Pet. App. 11a n.4; see *id.* at 14a-15a.

The court of appeals agreed with the FTC's determination that, because petitioner's membership is dominated by actors competing in the relevant market, it should be treated as a private actor for purposes of the state action doctrine, and therefore must satisfy both *Midcal* elements. Pet. App. 14a-17a (citing *Goldfarb*, *supra*; *Asheville Tobacco Bd. of Trade, Inc.* v. *FTC*, 263 F.2d 502, 509 (4th Cir. 1959)). The court rejected petitioner's reliance on various appellate decisions holding that particular state agencies resemble municipalities and therefore are not subject to the active-supervision requirement. Such cases, the court explained, did not establish the "bright-line rule that [petitioner] requests" because each depended on the particular features of the state

agency at issue. *Id.* at 16a-17a n.6. The court of appeals also emphasized that "more quintessential state agencies" may not need to satisfy the active-supervision requirement. *Id.* at 11a n.4.

Judge Keenan concurred "to emphasize the narrow scope of [the court's] holding * * * and to discuss the practical implications of [the court's] decision." Pet. App. 29a. Judge Keenan explained that "the fact that [petitioner] is comprised of private dentists elected by other private dentists, along with North Carolina's lack of active supervision of the Board's activities," left the court "with little confidence that the state itself, rather than a private consortium of dentists, chose to regulate dental health in this manner." *Id.* at 32a-33a.

ARGUMENT

The court of appeals correctly applied this Court's precedents in sustaining the FTC's determination that, because petitioner's members compete in the market for teeth-whitening services, petitioner's conduct with respect to that market would be exempt from antitrust scrutiny only if actively supervised by the State. Petitioner does not contend in this Court that it can demonstrate such active supervision, or that its campaign to exclude its members' would-be competitors from that market was otherwise lawful. Although some variation exists in the reasoning of older appellate decisions regarding the applicability of the active-supervision requirement to certain state agencies, petitioner identifies no sound reason to conclude that any other court of appeals would have reached a different outcome on the facts of this case. Further review is not warranted.

1. a. Under this Court's precedents, the State, acting as sovereign, may regulate its economy and impose market restraints "as an act of government." *Parker* v.

Brown, 317 U.S. 341, 350, 352 (1943). The exemption of anticompetitive conduct under the state action doctrine "is disfavored," *FTC* v. *Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992), however, "given the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws." *FTC* v. *Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1010 (2013). Thus, the Court recognizes "state-action immunity only when it is clear that the challenged anticompetitive conduct is undertaken pursuant to a regulatory scheme that 'is the State's own.'" *Ibid.* (quoting *Ticor*, 504 U.S. at 635).

Restraints on trade that are directed by a State's legislature or the State's highest court acting in a legislative capacity are sovereign acts and on that basis alone are exempt from challenge under the federal antitrust laws. *Parker*, 317 U.S. at 350-351; *Bates* v. *State Bar*, 433 U.S. 350, 359-360 (1977). But when a challenged restraint is not directed by the State in its sovereign capacity and is instead "carried out by others pursuant to state authorization," "[c]loser analysis is required." *Hoover* v. *Ronwin*, 466 U.S. 558, 568 (1984). That analysis considers (1) whether "the challenged restraint" is "clearly articulated and affirmatively expressed as state policy," and (2) whether that "policy" is "actively supervised by the State itself." *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (internal quotation marks omitted). There is a "close relation between *Midcal*'s two elements. Both are directed at ensuring that particular anticompetitive mechanisms operate because of a deliberate and intended state policy." *Ticor*, 504 U.S. at 636. "Th[e] active supervision requirement ensures that a State's actions will immunize the anticompetitive conduct of private parties only when

the 'state has demonstrated its commitment to a program through its exercise of regulatory oversight.'" *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, 471 U.S. 48, 62 n.23 (1985) (quoting 1 Phillip E. Areeda & Donald F Turner, *Antitrust Law* § 213a, at 73 (1978)).

The rule is different for certain sub-state entities, such as municipalities and other political subdivisions. Because those entities "are not themselves sovereign," "state-action immunity under *Parker* does not apply to them directly." *Phoebe Putney*, 133 S. Ct. at 1010. Such entities are, however, exempt from federal competition law "when they act 'pursuant to state policy to displace competition with regulation or monopoly public service.'" *Ibid.* (quoting *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 413 (1978) (opinion of Brennan, J.)). Unlike private entities, sub-state entities generally may claim that exemption even if they are not "actively supervised by the State," *Midcal*, 445 U.S. at 105, "because they have less of an incentive to pursue their own self-interest under the guise of implementing state policies." *Phoebe Putney*, 133 S. Ct. at 1011 (citing *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34, 46-47 (1985)).

This Court has cautioned, however, that some cases require close analysis to decide whether an entity is subject to *Midcal*'s two-part test or *Hallie*'s one-part test. In *Hallie* itself, the Court observed (without deciding) that "[i]n cases in which the actor is a state agency, it is likely that active state supervision would also not be required." 471 U.S. at 46 n.10. The Court went on, however, to contrast that situation with one involving "state or municipal regulation by a private party." *Ibid.* (citing *Southern Motor Carriers*, 471 U.S. at 62). In the latter case, "active state supervision must be shown, even

where a clearly articulated state policy exists." *Ibid.* (citing *Southern Motor Carriers*, 471 U.S. at 62).

b. Under that analysis, petitioner may claim an exemption from federal competition law only for conduct that is actively supervised by North Carolina. Petitioner's membership, and thus petitioner itself, is dominated by private actors who participate in the very market in which petitioner acted anticompetitively. That structural feature, in turn, precludes any assurance that petitioner's conduct reflects the State's sovereign will. See *Patrick* v. *Burget*, 486 U.S. 94, 100 (1988) ("Where a private party is engaging in anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State.") (quoting *Hallie*, 471 U.S. at 47).

The court of appeals was thus correct to recognize that a body dominated by market participants can be expected to "foster anticompetitive practices for the benefit of its members." Pet. App. 14a (quoting *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 791-792 (1975)). A showing of active supervision would ensure that "the State has exercised sufficient independent judgment and control so that the details of the [challenged action] have been established as a product of deliberate state intervention." *Id.* at 15a (brackets in original) (quoting *Ticor*, 504 U.S. at 634). But petitioner does not contend in this Court that it is subject to such supervision.

Contrary to petitioner's suggestions (Pet. 31-32), *Goldfarb* provides particularly strong support for the decision below. In that case, the Virginia State Bar Association, like petitioner here, was a "state agency by law," 421 U.S. at 790, and it invoked the state action doctrine when it was sued for imposing an exclusionary minimum-fee schedule for attorneys. In rejecting the

Bar's claim to an exemption from federal competition law, this Court observed that the Bar's enforcement of the fee schedule (through its ethics opinions) was undertaken "for the benefit of its members," and that "there [wa]s no indication * * * that the Virginia Supreme Court approve[d] the [ethics] opinions." *Id.* at 790-791. Of particular significance here, the Court intimated that the state action exemption would have been available if the Virginia Supreme Court had exercised a more active supervisory role—for example, by itself approving and adopting the ethics opinions. See *id.* at 791; see also *Hoover*, 466 U.S. at 569 ("[T]he degree to which the state legislature or supreme court supervises its representative [is] relevant to the inquiry.") (citing, *inter alia*, *Goldfarb*, 421 U.S. at 791).

Like the Virginia State Bar, petitioner is formally denominated an "agency of the state," and it consists chiefly of active market participants who are economically affected by competitive threats from new entrants into the markets they serve (such as non-dentists who offer teeth-whitening services). Under *Goldfarb* and its progeny, petitioner's constituent members are thus "persons with economic incentives to restrain trade," *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, 486 U.S. 492, 501 (1988), and are the natural and proper subjects of *Midcal*'s active-supervision requirement.[4]

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[4] Petitioner suggests that this Court's decision in *Ticor* foreclosed the court of appeals from considering whether petitioner's members participate in the relevant market or are instead "*disinterested*." Pet. 32 (citing 504 U.S. at 634-635). The cited discussion in *Ticor* explains that courts applying the state action doctrine do not inquire into the wisdom of the economic policies actually adopted by the State itself. 504 U.S. at 634. Here, by contrast, questions about petitioner's members' private participation in the relevant market go to the antecedent question—at the heart of the

The leading antitrust treatise concurs. It recommends that courts "presum[e] * * * as 'private' [for state action purposes] any organization in which a decisive coalition (usually a majority) is made up of participants in the regulated market." 1A Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 227b, at 226 (4th ed. 2013). It also urges that the presumption of private action "become virtually conclusive where the organization's members making the challenged decision are in direct competition with the [affected rival] and stand to gain from the [rival's] discipline or exclusion." *Ibid.* That precisely describes the situation here.

c. Petitioner repeatedly refers to itself as "an official state entity" that carries out "sovereign acts of Government." Pet. 3, 10, 19, 27, 28, 32; see Am. Dental Ass'n (ADA) Amicus Br. 7 (asserting that the dispositive question is whether petitioner is a state agency as a matter of state law). Those labels do not control the relevant federal-law inquiry. This Court does not generally resolve substantive questions of federal antitrust law on the basis of state-law labels. Cf. *American Needle, Inc.* v. *National Football League*, 560 U.S. 183, 191-192 (2010) (emphasizing that antitrust courts must "seek the central substance of the situation' and therefore * * * 'are moved by the identity of the persons who act, rather than by the label of their hats'") (quoting *United States* v. *Sealy, Inc.*, 388 U.S. 350, 353 (1967)); *Hallie*, 471 U.S. at 39 ("The determination that a[n actor's] activities constitute state action is not a purely formalistic inquiry.").

That focus on substance rather than form underlies this Court's holdings that municipalities generally need

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state action doctrine—whether the relevant anticompetitive conduct is properly understood as the *State's* action at all.

not prove active supervision by the State in order to invoke the state action doctrine. The justification for that rule is not that municipalities possess formal public charters. Rather, it is that municipalities "have less of an incentive to pursue their own self-interest under the guise of implementing state policies." *Phoebe Putney*, 133 S. Ct. at 1011; see *Hallie*, 471 U.S. at 47 ("Where the actor is a municipality, there is little or no danger that it is involved in a *private* price-fixing arrangement."). Here, by contrast, where petitioner's members have an evident "incentive to pursue their own self-interest," *Phoebe Putney*, 133 S. Ct. at 1011, petitioner's formal designation as a state agency does not assure that its regulatory actions accurately reflect state policy.

Thus, with respect to the substantive characteristics that are crucial to the state action doctrine, petitioner is more closely analogous to a typical private trade association than to a municipality or traditional state regulatory agency. A dominant group of petitioner's members are economically self-interested private actors—dentists competing in the same market they regulate. And, like the board members of a private trade association that may govern its members' conduct to some extent, petitioner's members are largely accountable to their fellow market participants rather than to the State.

This Court in *Hallie* foresaw the need to draw such distinctions when it contrasted an ordinary "state agency" (which "likely" would not require active supervision) with "state or municipal regulation by a private party" (which would). 471 U.S. at 46 n.10. The latter category presumes the existence of hybrid entities that are properly viewed (for these purposes) as "private part[ies]" even though they participate in "state or municipal regulation." *Ibid.* As an example of such an

entity, the Court in *Hallie* referred, see *ibid.* (citing 471 U.S. at 62), to the "rate bureaus" at issue in *Southern Motor Carriers*, which were associations of competitors that formed an established part of the States' schemes for regulating motor carriage rates, *Southern Motor Carriers*, 471 U.S. at 50-52. The Court's decisions thus recognize a category of actors that, despite bearing something of the State's imprimatur, nonetheless require active supervision to qualify for an exemption from federal competition law. The court of appeals correctly held that petitioner fits within that category.

The manner in which petitioner's members are selected reinforces the need for active supervision by the State. See Pet. App. 59a. When members of a regulatory body are elected by the public, or when they are appointed by the governor or other high-level state official, their mode of selection may place at least some check on the natural tendency of the competitor-members to act in their own self-interest because it arguably introduces an element of political accountability. Cf. *Ticor*, 504 U.S. at 636 ("States must accept political responsibility for actions they intend to undertake."); *Hallie*, 471 U.S. at 45 n.9 ("[M]unicipal officers * * * are checked to some degree through the electoral process."). Petitioner's members, by contrast, are elected by and accountable to no one but other dentists, who share the interest of petitioner's members in suppressing competition from non-dentists.[5] Under these circumstances, petitioner's ar-

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[5] Petitioner correctly surmises that, under the approach taken by the FTC in this case, executive appointment or legislative confirmation of members who nonetheless remain market participants does not eliminate the need to show active supervision. See Pet. 23-24 & n.2 (citing Pet. App. 35a-36a, 58a, 81a). Nevertheless, although it is unclear whether the manner in which petitioner's

gument logically depends on the proposition that active supervision is *never* required if state law declares the relevant entity to be a "state agency." But the principle that "a State may not confer antitrust immunity on private persons by fiat," *Ticor*, 504 U.S. at 633, would be easily subverted if the active-supervision requirement could be avoided through the use of such nomenclature.

2. As the court of appeals (Pet. App. 15a-16a & n.6) and the FTC (*id.* at 51a-56a) recognized, the bulk of the relevant case law in the courts of appeals either directly supports the conclusion that petitioner must show active supervision to qualify for the state action exemption, or is factually distinguishable. Petitioner largely confines its claim of a circuit conflict (Pet. 13-17) to a discussion of *Earles* v. *State Board of Certified Public Accountants*, 139 F.3d 1033 (5th Cir.), cert. denied, 525 U.S. 982 (1998), and *Haas* v. *Oregon State Bar*, 883 F.2d 1453 (9th Cir. 1989), cert. denied, 494 U.S. 1081 (1990). See also Pet. 17-18 & n.1 (identifying some decisions as "inapposite," and observing with little elaboration that other decisions reflect "similar results as *Hass* and *Earles*"). Contrary to petitioner's contention, the ruling below does not conflict with either *Earles* or *Haas*.

a. The courts in *Earles* and *Haas* rejected antitrust claims brought against regulatory boards controlled by members of a profession (accountants and lawyers, respectively). Without requiring proof of active supervision by the State, the courts held that the boards could

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members were selected was essential to the Fourth Circuit's decision (see Pet. App. 15a-16a), the court of appeals noted the members' selection by fellow dentists as one reason among several to view petitioner's actions with antitrust concern (*id.* at 14a), and Judge Keenan's concurring opinion highlighted that factor (see *id.* at 30a).

invoke the state action doctrine, based in part on the boards' possession of some formal features under state law that roughly resembled those of a municipality. See *Earles*, 139 F.3d at 1041; *Haas*, 883 F.2d at 1460. In neither case, however, did the court regard the challenged board action as responding to a competitive threat facing the existing market participants who dominated the board, a salient feature of petitioner's action here.

Although the board in *Haas* was dominated by bar members, see 883 F.2d at 1460, the challenged rule—which required Oregon attorneys to participate in the state bar's own professional liability fund—did not implicate competition among bar members or between bar members and non-attorneys, because board members were not themselves engaged in the business of liability insurance. See *id.* at 1455-1456. Similarly, although the board in *Earles* was "composed entirely of [accountants] who compete in the profession they regulate," 139 F.3d at 1041, the court concluded that the challenged rule—which forbade accountants from simultaneously practicing "incompatible occupations" (such as selling securities), *id.* at 1035—was not a "cozy arrangement to restrict competition." *Id.* at 1041.

By contrast, petitioner's exclusionary conduct directly affected competition between dental and non-dental providers of teeth-whitening services, *i.e.*, competition in the very market in which petitioner's members participate. The court of appeals correctly sustained the FTC's determination that those facts properly controlled the state action analysis, notwithstanding features of state law that standing alone (as in *Earles* and *Haas*) might have suggested that the active-supervision inquiry was unnecessary. Nothing in *Earles* or *Haas* would foreclose

the Fifth or the Ninth Circuit from reaching the same conclusion as the court below in a case, like this one, that involves self-interested regulatory conduct by a similarly constituted body.

b. Each of the decisions petitioner cites has an additional feature that further undermines petitioner's claim that a live circuit conflict exists.

The membership of the board at issue in *Earles* was "chosen by the governor from a slate of candidates proposed by [members of the profession] and * * * confirmed by the state senate." 139 F.3d at 1035. In this case, by contrast, the court of appeals attached at least some weight to the fact that petitioner's members are elected by other dentists. See pp. 17-18 & note 5, *supra*; see also Pet. App. 57a n.12. That difference reinforces the conclusion that, if the Fifth Circuit ever confronts a case that involves a regulatory body similar to petitioner, that court's decision in *Earles* will not be controlling.

As for *Haas*, it is unclear whether that decision remains authoritative within the Ninth Circuit. After *Haas*, this Court emphasized in *Patrick* v. *Burget* the importance of ultimate state control over the challenged anticompetitive conduct. 486 U.S. at 100-101. The Ninth Circuit subsequently concluded, in light of *Patrick*, that a labor council created under state law and filled with members appointed by state officials may not qualify as a "state agency" for purposes of the state action doctrine if it is controlled by "private members [who] have their own agenda which may or may not be responsive to state labor policy." *Washington State Elec. Contractors Ass'n* v. *Forrest*, 930 F.2d 736, 737 (per curiam), cert. denied, 502 U.S. 968 (1991); see *Washington State Elec. Contractors Ass'n* v. *Forrest*, 839 F.2d 547, 549-550, 553-554 (9th Cir.) (describing council's status under state law), cert.

granted, vacated, and remanded, 488 U.S. 806 (1988). The Ninth Circuit in *Forrest* acknowledged *Haas* but made no effort to distinguish it, relying instead on this Court's "key language in *Patrick*," which required application of "the rigorous two pronged test" of *Midcal*. 930 F.3d at 737 (internal quotation marks omitted).

3. Petitioner argues that the court of appeals' decision conflicts with this Court's decisions in *Parker*, *supra*; *Hallie*, *supra*; and *City of Columbia* v. *Omni Outdoor Adver., Inc.*, 499 U.S. 365, 374-375, 399 (1991). Pet. 19-31. No conflict exists.

a. Petitioner emphasizes (Pet. 19-22) that this Court in *Parker* did not discuss the role of active supervision of the raisin marketing program challenged there. Petitioner notes in particular that six of the nine members of the California Agricultural Prorate Advisory Commission were required "to be engaged 'in the production of agricultural commodities.'" Pet. 21 (quoting 1939 Cal. Stat. ch. 894, § 3). Petitioner suggests (Pet. 21-22) that, if the composition of the Advisory Commission was of no moment in *Parker*, petitioner's own membership should likewise be of no concern here.

The inference that petitioner would draw is unwarranted. As an initial matter, the compatibility of California's law with the Sherman Act was "a query raised by th[is] Court and not by [the] respondent" in *Parker*, see Supplemental Appellant Br. at 35, *Parker*, *supra* (No. 46), and the lower court had not passed on the matter (see *Brown* v. *Parker*, 39 F. Supp. 895 (S.D. Cal. 1941), rev'd, 317 U.S. 341 (1943)). Thus, this Court apparently did not have before it (a) a meaningful record regarding the actual operation of the statute; (b) details of the precise relationship among the Advisory Commission, the "Program Committee," and the "State Director of

Agriculture" as it related to the challenged restraint, 317 U.S. at 344; or (c) evidence on whether the members of the Advisory Commission were participants in the raisin market (as opposed to the market for any number of other "agricultural commodities" produced in California).

In any event, the question presented here concerns the proper application of *Midcal* and later decisions to petitioner's conduct. This Court's 1943 opinion in *Parker* cannot reasonably be viewed as addressing a feature of the state action doctrine that this Court did not make explicit until nearly four decades later in *Midcal*. Moreover, if the Court had already held in *Parker* that no "official state entity" need satisfy the active-supervision element, see Pet. 19-20, it would have had no reason to identify and reserve the issue in *Hallie*, 471 U.S. at 46 n.10.

b. Petitioner argues that the Court in *Hallie* dispensed with the active-supervision element for municipalities because no "private arrangement" was involved there. Pet. 27. Petitioner further asserts (*ibid.*) that private action is similarly absent here "because the only conduct involved is [petitioner's] unquestionably official conduct." As explained above, see pp. 12-13, 15-17, *supra*, that argument both misstates *Hallie*'s rationale and improperly elevates formal labels over actual substance.

c. Petitioner contends that, by treating the economic self-interest of petitioner's members as a ground for applying the active-supervision requirement, the court of appeals contravened this Court's holding in *Omni Outdoor* that the unsavory motives of local officials cannot forfeit a municipality's state action exemption. Pet. 30. Petitioner advanced no such argument before the FTC

or in the court of appeals. In any event, petitioner's argument misconceives *Omni Outdoor*'s reasoning.

In *Omni Outdoor*, this Court considered whether anticompetitive municipal conduct that otherwise qualified for a state action exemption could lose that exemption if the relevant public officials' motives were illicit—if, for example, those officials had conspired with private actors to further private ends. 499 U.S. at 374-379. The Court held it improper to look behind such official actions to determine whether they reflect "perceived conspiracies to restrain trade." *Id.* at 379 (quoting *Hoover*, 466 U.S. at 580)). The Court explained, however, that its decision "in no way qualif[ied] the well-established principle that 'a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful.'" *Ibid.* (quoting *Parker*, 317 U.S. at 351).

Omni Outdoor indicates that, if a particular governmental body (there, a municipality) is otherwise entitled to invoke the state action doctrine, its entitlement to that protection does not depend on a judicial inquiry into its officers' motives for particular conduct. Here, by contrast, the dispute concerns the antecedent question whether petitioner is entitled to invoke the state action doctrine at all. The court of appeals' decision, moreover, does not turn upon any judicial or FTC finding about the actual motives of petitioner's members for issuing the cease-and-desist orders. Rather, it reflects the more general conclusion that "when a state agency is operated by market participants who are elected by other market participants, it is a 'private' actor" for purposes of federal competition law. Pet. App. 17a. That approach does not entail "the sort of deconstruction of the governmen-

tal process and probing of the official 'intent'" that the Court in *Omni Outdoor* rejected. 499 U.S. at 377.

4. Petitioner and its amici argue that the court of appeals' "holding radically overrides a State's sovereign choices concerning who shall serve as its officers and how it shall exercise control over them." Pet. 33 (internal quotation marks omitted); see W Va. Amicus Br. 10-16; ADA Amicus Br. 13-17; N.C. State Bar Amicus Br. 7-14. That mischaracterizes the decision below and its context within the state action doctrine.

Midcal's active-supervision element is not a diktat to the States. Rather, it describes part of the conditions under which federal law—ordinarily supreme in our system, see U.S. Const. Art. VI, Cl. 2—will subordinate itself to a State's sovereign policy choice. Nothing in the decision below suggests that North Carolina is legally obligated to exercise any particular degree of supervision over petitioner or its members. Rather, if a State fails to supervise the conduct of particular private actors, including self-interested individuals vested with a degree of government power, the only consequence is that those actors' conduct will be subject to the same federal competition-law requirements and prohibitions that apply to private conduct generally.

The court of appeals' decision also does not make the availability of the state action doctrine contingent on a State's adoption of any particular regulatory model. See *Ticor*, 504 U.S. at 639 ("We do not imply that some particular form of state or local regulation is required to achieve ends other than the establishment of uniform prices."). If a State constitutes entities like petitioner in the way that most traditional state agencies are constituted—with disinterested state officials who are either elected by the public or appointed by higher-level

state officers—such boards will likely be exempt from antitrust scrutiny without needing to satisfy the second (*i.e.*, active-supervision) *Midcal* prong. See *Hallie*, 471 U.S. at 46 n.10. Alternatively, the State may staff such boards with self-interested participants and empower them to exclude rivals, while providing appropriate supervision to ensure that such anticompetitive exclusion indeed reflects state policy.[6] That sort of supervision supports, rather than frustrates, both political accountability and the execution of state regulatory programs without distortion from private economic interests. See *Ticor*, 504 U.S. at 635-637.

For similar reasons, faithful application of the *Midcal* analysis does not threaten the States' ability to involve learned professionals in the regulation of health and safety. See Pet. 34; W. Va. Amicus Br. 11-12. Regulation of a learned profession need not entail a departure from federal law's "assumption that competition is the best method of allocating resources." *National Soc'y of Prof'l Eng'rs* v. *United States*, 435 U.S. 679, 695 (1978). And even when States conclude that particular departures from that policy are appropriate, many States have established regulatory bodies that include representatives of learned professions yet ensure, through mechanisms for independent review and approval, that the

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[6] Contrary to amici's claims (ADA Amicus Br. 9; N.C. State Bar Amicus Br. 11), there is nothing anomalous about active state supervision of a regulatory board. In *Bates*, for example, this Court explained that, "[a]lthough the [Arizona] State Bar plays a part in the enforcement of [state disciplinary] rules, its role is completely defined by the [Arizona Supreme Court]; the [Bar] acts as the agent of the court under its continuous supervision." 433 U.S. at 361; see *id.* at 353 n.3 (noting the establishment of the Bar as an agency of the state supreme court).

ultimate decisions are the State's own.[7] Indeed, this Court's decisions in *Bates*, *Hoover*, and *Patrick* illustrate that a variety of state mechanisms are available to oversee the conduct of regulatory entities established under state law.

Petitioner's claim of substantial intrusion on state prerogatives rings particularly hollow on the facts of this case. The FTC's administrative order allows petitioner to file court actions against non-dentists who offer teeth-whitening services, while prohibiting petitioner from unilaterally issuing extra-judicial cease-and-desist orders against such providers. See Pet. App. 145a-148a. The court of appeals concluded, however, that even as a matter of North Carolina law, petitioner "does not have the authority to discipline unlicensed individuals or to order non-dentists to stop violating the [DPA]." *Id.* at 5a-6a. Because the practical effect of the FTC's order was to bar petitioner from employing coercive measures that it lacked state-law authority to undertake, that

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[7] In West Virginia, for example, the dental board can only propose rules, which can then be adopted by the legislature. See W. Va. Code Ann. § 30-4-6 (LexisNexis). Likewise, in Connecticut, Illinois, and Utah, the dental board has authority only to make recommendations to another (independent) state official. See Conn. Gen. Stat. Ann. § 20-103a (West); 225 Ill. Comp. Stat. 25/7 (West); Utah Code Ann. § 58-1-202 (LexisNexis); see also, *e.g.*, Colo. Rev. Stat. Ann. § 12-35-104 (LexisNexis) (Colorado dental board under supervision and control of state division of professions and occupations in the department of regulatory agencies); Mass. Ann. Laws ch. 112, § 1 (LexisNexis) (Massachusetts public health commissioner supervises work of dental board). In North Carolina, the great majority of state regulatory boards (51 of 57) are *not* constituted as petitioner is, with members accountable only to its regulated market participants. See Compl. Counsel's Proposed Findings of Fact ¶¶ 46-47 (summarizing composition of the 57 North Carolina regulatory boards).

order effected no significant intrusion on state prerogatives.[8]

Finally, petitioner and its amici argue that the decision below might make market-participant members of state regulatory boards more reluctant to serve on such bodies. See Pet. 35; ADA Amicus Br. 15; N.C. State Bar Amicus Br. 9. That objection has not moved this Court in the past, and it should not here. See, *e.g.*, *Patrick*, 486 U.S. at 105 (explaining that such a concern "essentially challenges the wisdom of applying the antitrust laws to the sphere of medical care, and as such is properly directed to the legislative branch").

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[8] An amicus asserts that, in light of the decision below, the dental board in West Virginia "has declined to take action in response to complaints received concerning the unauthorized practice of dentistry by unlicensed individuals performing teeth-whitening services within the State." W. Va. Amicus Br. 13. That is perplexing. As the FTC's order here recognizes, Pet. App. 147a-148a, an entity like petitioner would not violate the law by bringing judicial enforcement actions or by sending letters threatening litigation (in contrast to the cease-and-desist orders that petitioner issued). And petitioner's chief executive officer "testified that [petitioner's] ability to enforce the [DPA] would not be affected if it sent litigation warning letters instead of cease and desist letters." *Id.* at 139a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 2014

REPLY BRIEF

No. 13-534

In the Supreme Court of the United States

THE NORTH CAROLINA STATE BOARD
OF DENTAL EXAMINERS,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

It is undisputed that the Board is a *bona fide* agency of the State of North Carolina, charged with regulating the practice of dentistry pursuant to state-law powers and state-law duties that public entities traditionally have and that private actors typically do not have. Pet. 3-4; BIO 2-3. The disputed question is whether the Fourth Circuit erred by nevertheless treating the Board as if it were a "private" actor for purposes of state-action antitrust immunity—and thus subject to the "active supervision" requirement—simply because state law provides that a majority of the Board's members must also be practicing dentists. Pet. 10; BIO 10.

The certiorari petition demonstrated that the Fourth Circuit's decision warrants review for three reasons: (I) it conflicts with decisions of the Fifth and Ninth Circuits, Pet. 13-18; (II) it conflicts with the legal rule consistently applied in this Court's decisions, *id.* 19-32; and (III) it presents exceptionally important questions of federalism and state sovereignty, *id.* 33-36. Numerous *amici*—including 10 States and national associations of both regulators and the regulated—have powerfully underscored the need for review, by detailing the widespread and immediate harm imposed by this unprecedented break from 70 years of state-action jurisprudence. As demonstrated below, the opposition brief does not credibly refute these points.

I. THE FTC FAILS TO REFUTE THE CONFLICT BETWEEN THE FOURTH CIRCUIT'S DECISION AND DECISIONS OF THE FIFTH AND NINTH CIRCUITS

The FTC concedes that, unlike the decision below, *Earles v. State Board of Certified Public Accountants of Louisiana*, 139 F.3d 1033 (5th Cir. 1998), and *Hass v. Oregon State Bar*, 883 F.2d 1453 (9th Cir. 1989), both "held that the boards [there] could invoke the state action doctrine" "[w]ithout ... proof of active supervision by the State" *even though* they were "controlled by members of [the regulated] profession." BIO 18-19; *see also* Pet. 13-18. The FTC even concedes "some variation" between "the reasoning" of these cases and the decision below. BIO 10. Nevertheless, the FTC futilely attempts to deny that a circuit conflict exists.

A. The FTC's primary argument is that "[i]n neither [*Earles* nor *Hass*] ... did the court regard the challenged board action as responding to a competitive threat facing the existing market participants who dominated the board." *Id.* 19. But this argument is legally and factually baseless.

Legally, the rule adopted in each case does not mention or permit the FTC's proposed distinction. As for *Earles*:

> [T]he Board is functionally similar to a municipality.... Despite the fact that the Board is composed entirely of [accountants] who compete in the profession they regulate, the public nature of the Board's actions means that there is little danger of a cozy arrangement to restrict competition. So long as the Board is acting within its authority

> and pursuant to a clearly established state policy, there is no need for active supervision of the exercise of properly delegated authority. (139 F.3d at 1041.)

Likewise, for *Hass*:

> These [state-law] requirements leave no doubt that the Bar is a public body [despite the requirement that 12 of the 15 members of the Bar's governing board must be practicing attorneys].... [W]e hold that the Bar, as an agency of the State of Oregon, need not satisfy the 'active supervision' requirement ... [a]s long as [it] acts pursuant to a clearly articulated and affirmatively expressed state policy. (883 F.2d at 1460-61.)

These *unqualified* holdings foreclose the FTC's assertion that the decisions rested on unique factual grounds as well as its speculation that future panels might manufacture such distinctions.

Factually, there is also no basis for the FTC's contention that the challenged conduct in these cases did not implicate the competitive interests of the market-participant officials. In *Earles*, the ban on selling securities deprived accountants with securities licenses of their competitive advantage over accountants without securities licenses. *See* 139 F.3d at 1034-36, 1043 n.12. Similarly, in *Hass*, the requirement that all attorneys had to buy malpractice insurance from a state fund forced lower-risk attorneys to cross-subsidize premiums for higher-risk attorneys. *See* 883 F.2d at 1455-56, 1463. In short, the agencies' challenged conduct had self-evident competitive implications for their market-participant officials; nevertheless, the Fifth

and Ninth Circuits declined to require active supervision—in direct conflict with the Fourth Circuit here.

B. The FTC's additional arguments denying a circuit conflict also fail.

As to *Earles*, the FTC speculates that the Fifth Circuit might rule differently where, as here, the agency's market-participant officials are elected by fellow market participants, rather than selected (as in *Earles*) by the State from an exclusive slate of nominations made by fellow market participants. BIO 20. But the FTC never disputes that this minor factual difference in state-law selection methods is irrelevant under the legal rule of *Earles*, which turns solely on "the public nature" of the agency's actions. Pet. 14-15; *supra* at 2-3. Indeed, the FTC's suggestion that the Fifth Circuit would treat the selection method as a *dispositive* distinction is especially disingenuous given the FTC's concession that its own "approach taken ... in this case" treated the selection method as an *immaterial* distinction. *See* BIO 17 n.5.

As to *Hass*, the FTC speculates that it might no longer be "authoritative within the Ninth Circuit" after *Washington State Electrical Contractors Ass'n v. Forrest*, 930 F.2d 736 (9th Cir. 1991) (per curiam). BIO 20-21. But that two-page opinion merely remanded for additional fact-finding without ruling on the merits. 930 F.2d at 736-37. *Forrest* did not purport to abrogate *Hass*, and no case has suggested otherwise over the past 23 years. Nor could *Forrest* have abrogated *Hass*, since Ninth Circuit precedent binds later panels absent "intervening higher authority" that is "clearly irreconcilable." *See Miller*

v. Gammie, 335 F.3d 889, 892-93 (9th Cir. 2003) (en banc). The FTC responds that *Patrick v. Burget*, 486 U.S. 94 (1988), was decided "[a]fter *Hass*" and could authorize abrogating it, BIO 20-21, but that is not true: among other things, *Patrick* was decided more than a year *before Hass*.

C. The FTC's illusory speculation is particularly improper given the compelling need for immediate review.

As explained by 10 States (who comprise 4 of the 5 States inside the Fourth Circuit as well as 6 States outside the Fourth Circuit), "the Fourth Circuit's decision will have widespread and immediate negative consequences" because it "will cause unnecessary and detrimental changes" to the States' "ubiquit[ous] ... practice of relying on market participants to regulate professional conduct." WV *Amicus* Br. 11, 15. The States represent that given "the threat of lawsuits from both private parties and the [FTC]," they "will begin to take steps to alter the way they use market participants, if they continue to use them at all"; and "the longer this Court waits to resolve this issue, the more likely it is that States will take broad steps that will be difficult to reverse." *Id.* 2, 16.

Likewise, national and state associations of healthcare professionals and regulators have explained that "the need for this Court's guidance is urgent" because the decision below "will interfere with the operation of every state medical and dental board ... in the country." ADA *Amicus* Br. 11. They "represent ... that this case is being closely watched by ... many highly qualified practitioners," who "will either resign or refuse to accept office lest they face

significant personal antitrust exposure" "[i]f this case is permitted to stand." *Id.* 16.

In short, the harmful consequences of the decision below have already begun manifesting and spreading. Review is necessary now.

II. THE FTC FAILS TO REFUTE THE CONFLICT BETWEEN THE DECISION BELOW AND THE LEGAL RULE CONSISTENTLY APPLIED IN THIS COURT'S DECISIONS

The certiorari petition also demonstrated that the decision below conflicts with the rule established in this Court's antitrust state-action jurisprudence—namely, a *bona fide* state agency's enforcement of a clearly articulated anticompetitive state policy is a sovereign act of State government, without regard to whether the agency's officials are either acting independently from private interests or supervised by disinterested state decisionmakers. Pet. 19-32. The FTC's contrary arguments radically contradict this Court's precedents.

A. Most untenable is the FTC's treatment of *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991).

The FTC claims that *Omni* presented only the question whether a "governmental body [that] is *otherwise entitled* to invoke the state action doctrine" "could lose that exemption if the relevant public officials' motives were illicit," whereas this case presents "the *antecedent* question whether [the Board] is entitled to invoke the state action doctrine *at all*." BIO 23 (emphases added). In actuality, however, *Omni* unqualifiedly rejected the "proposition that ... government *regulatory* action may be deemed private ... when it is taken pursuant

to a conspiracy with private parties," which forecloses the FTC's proposed distinction between alleging a conspiracy to create an "exception" to the defendant's immunity and alleging a conspiracy to defeat the defendant's "prima facie entitle[ment]" to immunity. *See* 499 U.S. at 374-75. Indeed, the FTC's approach would effectively abrogate *Omni*, since plaintiffs could end-run it just by relabeling their argument. Rather than arguing for a "conspiracy exception" to immunity that is otherwise available, *id.*, they could argue (per the FTC) that municipal officials who conspire in favor of private interests must be actively supervised in order to satisfy their prima facie case for immunity.

The FTC also claims that the decision below complied with *Omni* because it did "not turn upon ... the *actual* motives of [the Board's] members," but rather "reflect[ed] the more general conclusion" that "a state agency ... operated by market participants" should be treated as "a 'private actor.'" BIO 23 (emphasis added). The only reason asserted for that conclusion, however, is that the FTC and Fourth Circuit are suspicious of Board members' *potential* motives: they perceive a "danger" that market participants may "act[] to further [their] own interests, rather than the governmental interests of the State." *See id.* 13; Pet.App. 15a. The FTC's proposed distinction is thus between questioning the defendants' actual motives versus their potential motives—a distinction foreclosed by *Omni*'s unqualified "rejection of any interpretation of [federal antitrust law] that would allow plaintiffs to look behind the actions of state sovereigns." *See* 499 U.S. at 379. Again, the FTC's approach would effectively abrogate *Omni*, since plaintiffs could end-

run it just by relabeling their argument. Rather than arguing that municipal officials actually have "corrupt motives" due to benefits received from market participants, *id.* at 367, 376, they could argue (per the FTC) that municipal officials who receive benefits from market participants must be actively supervised when regulating that market due to the potential danger that they are acting to further private rather than public interests.

Simply put, the FTC's grounds for distinguishing *Omni* make a mockery of its proclamation that this Court's "principle[s] ... [cannot] be avoided through the use of ... nomenclature." *See* BIO 18.

B. Almost as implausible is the FTC's treatment of *Parker v. Brown*, 317 U.S. 341 (1943).

The FTC claims that *Parker* is legally irrelevant because "the question presented here concerns the proper application of [*California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980)]." BIO 22. But *Midcal* merely synthesized "decisions [that] ha[d] applied *Parker*'s analysis." *See* 445 U.S. at 104-05. Thus, the recognition in *Parker*'s progeny that "private parties" "must be 'actively supervised,'" *id.* at 105, did not purport to abrogate the distinct immunity rule established in *Parker* for a State's own "officers or agents"—namely, they may not be "restrain[ed]" from performing "activities directed by its legislature." 317 U.S. at 350-51.

The FTC also claims that this Court should ignore the factual context of *Parker*, which applied its legal rule to a Commission operated by members who were also market participants and not actively supervised by disinterested state officials, because

this Court supposedly lacked "a meaningful record" concerning the precise role of the Commission's members who were market participants. BIO 21-22. But the fact that the Commission's decisions were not actively supervised by any other state entity is clear from this Court's opinion, *Parker*, 317 U.S. at 346-47, 352, and the fact that a super-majority of the Commission's members were also agricultural producers is clear from the statutory provision cited by this Court, Pet. 21. Nor is it credible for the FTC to object on the ground that it is not clear whether a majority of the Commission's agricultural-producer members had a financial interest in regulating the *particular commodity* involved in *Parker*. It is inconceivable that this landmark decision rested on an unstated factual assumption that such a majority did not exist. Likewise, it is inconceivable that the case would come out the opposite way if such a majority did in fact exist. After all, a financially self-interested Commission majority was entirely consistent with the State's anticompetitive purpose behind this regulatory scheme, which was unabashedly to "maintain prices in the distribution of ... commodities." *See Parker*, 317 U.S. at 346.

In sum, the FTC's contention that "[t]he court of appeals correctly applied this Court's precedents" (BIO 10) expressly disregards the seminal precedent of *Parker* itself.

C. The FTC is no better in its treatment of *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985).

First, the FTC claims that, because *Hallie* contrasted "a state agency" (which "likely" need not be actively supervised) with "a private party" (which needs to be actively supervised), *id.* at 46 n.10, it

somehow "presume[d] the existence of hybrid entities that are properly viewed ... as 'private parties' even though they participate in 'state or municipal regulation.'" BIO 16-17. But the fact that *Hallie* explicitly drew a *favorable* distinction *between* state agencies and private parties in no way implicitly "presumes" an *unfavorable* distinction *among* state agencies based on their composition.

Second, the FTC claims that *Hallie* held that the function of the active-supervision requirement is to prevent defendants from "pursu[ing] their own self-interest under the guise of implementing state policies"—a function that the FTC claims was held unnecessary for municipalities in *Hallie* yet is necessary for the Board here. *Id.* 12, 16. But, as the certiorari petition showed and the FTC ignores, *that function is already completely served* by the clear-articulation requirement. Pet. 25-26. Thus, properly understood, *Hallie* held instead that the active-supervision requirement serves *the distinct function of preventing the State from trying to immunize illegal private conduct* by merely casting "a gauzy cloak of state involvement" over private actors' independent anticompetitive arrangements—and that function is unnecessary for all public entities, including the Board, that are charged with traditional state-law powers and duties. *Id.* 26-28.

Finally, the FTC repeatedly claims that the Board's theory of both *Hallie* and state-action immunity turns on "labels" and "form." BIO 15, 18. But that assertion mischaracterizes the Board's consistent position here, which turns instead on a *substantive* question: is the agency at issue a *bona fide regulatory arm* of the State, or is it instead

merely a private entity participating within the State's regulatory scheme? Contrary to the FTC's assertion (*id.* 17-18), there is a fundamental distinction between a "private trade association" and a public agency like the Board that is charged with traditional governmental powers and duties. This is starkly confirmed by the FTC's inability to identify a single other case within 70 years of antitrust state-action jurisprudence that treats a *bona fide* State agency as a "private" actor subject to the active-supervision requirement.[1]

III. THE FTC FAILS TO REFUTE THE EXCEPTIONAL IMPORTANCE OF THE DECISION BELOW IN LIGHT OF ITS HARMFUL IMPACT ON THE STATES' SOVEREIGN REGULATORY REGIMES

The certiorari petition lastly demonstrated that the decision below seriously threatens state sovereignty and state regulation by interfering with the States' choices concerning the most effective way to structure their own agencies. Pet. 33-36. The FTC's cavalier dismissal of these concerns underscores the need for this Court's intervention.

A. The FTC's essential response is that the decision below "is not a diktat to the States" because it leaves them with options: (1) staff their agencies "with disinterested state officials"; (2) "provid[e]

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[1] As for *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), the FTC logically errs by treating this Court's "intimat[ion]" that active supervision might *sometimes be sufficient* as "strong support" for the distinct proposition that active supervision *is always necessary*. BIO 13-14. Critically, unlike in *Goldfarb*, requiring active supervision is unnecessary here because the clear-articulation requirement is already satisfied per the decisions below. Pet. 31; BIO 5-6.

appropriate supervision" of "self-interested" officials; or (3) accept the "consequence" that their officials "will be subject" to federal oversight. BIO 24-25. But, far from constituting a meaningful response, that rejoinder illustrates the intrusion here on a State's sovereign choice to structure its regulatory agencies in the manner that it deems most effective.

As the 10 State *amici* explain, because they obviously cannot risk "the threat of lawsuits from both private parties and the [FTC]," they must either "eliminat[e] reliance on the valuable expertise of market participants" or "add[] more costly and inefficient bureaucracy." WV *Amicus* Br. 2. Nor can the FTC rehabilitate the latter option merely by noting that, where regulatory agencies are operated by members who are also market participants, *some* States have chosen to actively supervise *some* of the regulatory decisions of *some* such agencies. BIO 25-26 & nn.6-7. That meager showing hardly justifies forcing *all* States to actively supervise *all* of the regulatory decisions of *all* such agencies.

B. The FTC also asserts that the Board's concerns about state sovereignty "ring[] particularly hollow" because the FTC's order only bars the Board "from employing coercive measures that it lacked state-law authority to undertake" *according to the FTC and court below*. BIO 26-27. But, of course, determining the proper scope of the Board's state-law authority is not a "federal antitrust job"; rather, that is the role of "state administrative review." *Omni*, 499 U.S. at 372. Thus, here again, the FTC's argument directly flouts *Omni* and "undermin[es] the very interests of federalism [that *Parker* immunity] is designed to protect." *Id.*

CONCLUSION

Certiorari should be granted.

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AMICUS CURIAE BRIEF

No. 13-534

IN THE

Supreme Court of the United States

THE NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE AMERICAN DENTAL ASSOCIATION, AMERICAN MEDICAL ASSOCIATION, ET AL. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

Amici American Dental Association, American Medical Association,[2] American Osteopathic Association, American Veterinary Medical Association, American Academy of Pediatric Dentistry, American Association of Orthodontists, American Society of Anesthesiologists, and the listed state medical societies have as members doctors whose practices are regulated by state boards in all fifty states, the District of Columbia, and U.S. territories. *Amici* American Association of Dental Boards and Federation of State Medical Boards are, respectively, the national associations of such boards in the fields of dentistry and medicine. *Amici* have a strong interest in supporting the determination by state legislatures that the health professions should be regulated by knowledgeable health care professionals who have practical experience in the profession that they are regulating. *Amici* and their members believe that the public is best served when state regulatory boards duly constituted in accordance with state law are free to make decisions on public health issues without fear of second-guessing under the federal antitrust laws.

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[1] After timely notification pursuant to Rule 37.2(a), the parties consented to the filing of this brief, and their consent letters are on file with the Clerk. In accordance with Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity has made any monetary contribution intended to fun the preparation or submission of this brief.

[2] The American Medical Association, along with the four state medical societies that join this brief as *amici*, files this brief both on its own behalf and as a representative of the Litigation Center of the American Medical Association and the State Medical Societies.

In direct conflict with holdings of two other Courts of Appeals, the Fourth Circuit's decision in this case allows the Federal Trade Commission ("FTC"), an agency with no particular knowledge of medicine or dentistry, to displace the judgment of an expert agency charged by its state legislature with determining what is in the public interest in the area of the agency's regulatory authority. Supreme Court review is required now because, as long as it is permitted to stand, the Fourth Circuit's decision will undermine the traditional role of the states in regulating the professions by subjecting the states to costly and uncertain antitrust litigation. It will also discourage knowledgeable practitioners both from serving on state regulatory Boards and from making difficult decisions as they face the prospect of antitrust liability despite acting in their capacities as state regulators.

Accordingly, *amici* respectfully urge the Court to grant certiorari and reverse the Fourth Circuit.

INTRODUCTION

North Carolina has decided—along with every other state in the country—that the best way to regulate dentistry in the public interest is to create a state licensing agency whose members include licensed dentists. Similarly, all 50 states have determined that the practice of medicine should be regulated by licensing boards that include licensed physicians, and each of the 14 states with a separate osteopathic board requires that the board's members include licensed osteopathic physicians. Moreover, 49 states have specified that veterinary medicine should be regulated by a board that includes licensed veterinarians.

The North Carolina State Board of Dental Examiners (the "Board") is "the agency of the State for the

regulation of the practice of dentistry," N.C. Gen. Stat. § 90-22(b), and is vested "with full power and authority to enact rules and regulations governing the practice of dentistry within the State," *id.* § 90-48. The Board has exclusive power to license individuals who wish to engage in the practice of dentistry—a practice which, by statute, includes the removal of "stains, accretions or deposits from the human teeth." *Id.* § 90-29(b)(2). Thus, the North Carolina legislature has decided that the Board should decide who may and who may not remove stains from teeth.

The FTC takes issue both with (a) North Carolina's decision that the agency which regulates the practice of dentistry in that State should consist primarily of practicing dentists and (b) the exercise by that agency of its regulatory authority in this case. Specifically, the FTC has determined that the Board's decision "to exclude non-dentists from the market for teeth whitening services" constitutes an unfair method of competition and is thus within the FTC's jurisdiction to review. Pet. App. 82a-83a. Sitting in judgment of the state agency, the FTC has forbidden the Board to so much as "discourag[e] the provision of Teeth Whitening Services by a Non-Dentist Provider"—despite the statutory directive that removal of stains from human teeth constitutes the practice of dentistry.[3] *Id.* at 146a. Predicating its assertion of jurisdiction on the manner in which the State legislature has chosen to constitute the Board of Dental Examiners, the FTC has subjected the Board to its continuing supervision: The Board must submit regular and detailed written reports on its ongoing compliance with

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[3] The statute in question does not refer to teeth whitening explicitly, but whitening is fairly characterized as "[r]emoving stains, accretions or deposits from the human teeth." N.C. Gen. Stat. § 90-29(b)(2).

the FTC's Order. *Id.* at 150a-151a. If the Board exercises its statutory authority to regulate the practice of dentistry in a way that conflicts with the FTC's Order, the Board faces civil penalties of up to $10,000 for each violation. *See* 15 U.S.C. § 45(l).

This is precisely the kind of interference with decisions of legislatively-created state regulatory agencies that this Court has held to be outside the purview of the federal antitrust laws in a system of dual sovereignty. *See Parker v. Brown*, 317 U.S. 341, 350-51 (1943) (holding that the federal antitrust laws do not "restrain a state or its officers or agents from activities directed by its legislature"). Notably, if a petition for review of the FTC Order in this case had come before the Fifth Circuit or the Ninth Circuit, the Order would have been vacated. Each of those Courts of Appeals has held that state-action immunity extends to the statutorily authorized actions of a state agency whose members are market participants—even where there is no "active supervision" of the agency by the State. *See Earles v. State Bd. of Certified Pub. Accountants of La.*, 139 F.3d 1033, 1041 (5th Cir. 1998) (holding agency exempt from federal antitrust laws "[d]espite the fact that the Board is composed entirely of CPAs who compete in the profession they regulate"); *Hass v. Or. State Bar*, 883 F.2d 1453, 1460-61 n.3 (9th Cir. 1989) (holding bar's Board of Governors exempt from federal antitrust laws even though it was comprised of practicing attorneys elected by attorneys); *see also* 883 F.2d at 1465 (Ferguson, J., dissenting) (criticizing majority for failing to account for the "Bar's private interests in the very field in which it regulates").

In the decision below, however, the Fourth Circuit took a different tack. It announced a rule that no Court of Appeals has ever adopted before: "state

agencies in which a decisive coalition is made up of participants in the regulated market, who are chosen by and accountable to their fellow market participants, are private actors and must" satisfy the active-supervision requirement of *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). Pet. App. 14a (internal quotation marks omitted). Applying this novel rule, the Fourth Circuit held that the Board was required to show that the challenged activity was actively supervised by the State. *Id.* at 17a. That holding creates a square conflict with the decision of the Fifth Circuit in *Earles* and with the decision of the Ninth Circuit in *Hass*.

The decision below is as significant as it is erroneous. Professional licensure is "at the core of the State's power to protect the public." *Bates v. State Bar of Ariz.*, 433 U.S. 350, 361 (1977). If state licensure decisions are subject to invalidation by federal agencies with no particular expertise in the healing arts, then those federal agencies will become the final arbiters of matters of public safety, tasks that they are ill-equipped to perform.

Apart from trampling on the sovereignty of states in our federal system, the decision below has three perverse consequences. First, it induces state regulatory agencies faced with difficult policy judgments to subordinate their view of what is in the best interest of the public—in favor of a policy choice that is less likely to expose an agency and its members to federal antitrust liability. Second, it strongly discourages conscientious practitioners from serving on state regulatory boards lest they be subject to the threat of personal liability, including treble damage actions brought by persons claiming that their actions as state regulators had anticompetitive consequences. Third, in order to avoid intrusion by the FTC in mat-

ters traditionally regulated by the states, the states will be pushed to alter their choices as to the membership and method of selection of members of state regulatory boards in favor of the FTC's preferences on these matters.

REASONS FOR GRANTING THE PETITION

I. THE FOURTH CIRCUIT'S ERRONEOUS DECISION CREATES A CONFLICT IN THE COURTS OF APPEALS.

As petitioner has shown, there is a split among the circuits as to whether *Midcal*'s active-supervision requirement applies to a state agency whose members are market participants elected by other market participants. Pet. 13-17; *see also* J. Thomas Rosch, FTC, Remarks at the 2012 Lewis Bernstein Memorial Lecture: Returning the State Action Doctrine to Its Moorings 6 (Oct. 3, 2012), http://www.ftc.gov/speeches/rosch/121003stateaction.pdf (explaining that "courts have been less than consistent with respect to the treatment of special-purpose regulatory agencies, such as professional licensing boards"). Rather than repeat petitioner's analysis, *amici* will highlight the competing principles that have generated the conflict in the Courts of Appeals and explain why the need for this Court's guidance is urgent.

A. The Fourth Circuit held that a state agency vested by the state legislature with "full power and authority to enact rules and regulations" is nonetheless a private actor for purposes of the antitrust state-action doctrine when its members are market participants selected by other market participants. Pet. App. 14a. The guiding principle for that holding, drawn in part from a 1991 law review article, is that "financially interested action is 'private action' subject to antitrust review." *Id.* (quoting Elhauge,

The Scope of Antitrust Process, 104 Harv. L. Rev. 667, 689 (1991)). According to the Fourth Circuit, when an agency's members are market participants, the agency's actions may be financially interested and thus private—and immune from the federal antitrust laws only when there is active state supervision.

Judged against the approach taken in other Courts of Appeals, the Fourth Circuit not only got the answer wrong; it got the question wrong as well. The proper question is whether a state regulatory board really is a state agency, such that its actions are those of the state itself. *Cf. FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 635 (1992) ("The question is not how well state regulation works but whether the anticompetitive scheme is the State's own."). It is not, as the FTC would have it, whether the board includes market participants or how the legislature has determined that members of the board should be selected.

In *Earles*, for example, the Fifth Circuit held that a state board of accountants was exempt from the active-supervision requirement in light of "the public nature of the Board's actions." 139 F.3d at 1041; *see also Benton, Benton & Benton v. La. Pub. Facilities Auth.*, 897 F.2d 198, 203 (5th Cir. 1990) (holding that defendant was a state agency and "*as such*" exempt from active-supervision requirement (emphasis added)). And in *Hass*, the key question at issue was whether the state bar was a state agency. *See, e.g.*, 883 F.2d at 1461 (finding that "the Bar is clearly an agent for the purposes of administering the malpractice insurance program"); *id.* at 1461 n.4 (suggesting that such a finding will justify state-action immunity when the clear articulation requirement is met).

Indeed, this Court has suggested that whether an entity is a state agency is likely dispositive, and the Courts of Appeals have followed that guidance. *See Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46 n.10 (1985) (noting that, where "the actor is a state agency, it is likely that active state supervision would also not be required, although we do not here decide that issue"); *Charley's Taxi Radio Dispatch v. SIDA of Haw., Inc.*, 810 F.2d 869, 876 (9th Cir. 1987) (decisions of the Hawaii Dept. of Transportation and its director are entitled to state action immunity); *Cine 42nd Street Theater Corp. v. Nederlander Org., Inc.*, 790 F.2d 1032, 1047 (2d Cir. 1986) (Urban Development Corporation authorized by state legislature need not satisfy the state supervision requirement); *Porter Testing Lab. v. Bd. of Regents*, 993 F.2d 768, 772 (10th Cir. 1993) (showing of active supervision is unnecessary for the State Board of Regents to qualify for state action antitrust immunity).

Framed this way, the instant case is straightforward. Virtually every decision to address the issue has held that a State Board of Medicine or a State Board of Dentistry is a legitimate state agency. *See, e.g., Bettencourt v. Bd. of Registration in Med.*, 904 F.2d 772, 781 (1st Cir. 1990); *Neuwirth v. La. State Bd. of Dentistry*, 845 F.2d 553, 555 (5th Cir. 1988); *Howard v. Miller*, 870 F. Supp. 340, 343 (N.D. Ga. 1994); *Connolly v. Beckett*, 863 F. Supp. 1379, 1381 (D. Colo. 1994). The fact that a state dental board may be composed entirely or largely of practicing dentists does not change the analysis. As one legal scholar has observed:

> State agencies occupy a dual role with respect to the articulation and implementation of state policy. Unlike municipalities, they may, within the scope of their delegated state law authority,

> adopt anticompetitive regulatory policies for the state as a whole. Because those actions by definition constitute state policy, they should be entitled to antitrust immunity under the Parker doctrine without any further requirement for clear articulation or active supervision by the state legislature.

C. Douglas Floyd, *Plain Ambiguities in the Clear Articulation Requirement for State Action Immunity*, 41 B.C. L. Rev. 1059, 1112 (2000).

Where the action of a state agency is at issue, the very concept of applying an "active state supervision" requirement makes no sense. The state can act only through its agents, and it is up to each state to determine which entities will be empowered to act on its behalf. And where a state agency acts pursuant to its delegated authority, it *is* the state. To require active supervision would be to "turn the State against itself and ultimately to commandeer the entire political machinery of the State." *Alden v. Maine*, 527 U.S. 706, 749 (1999).

Focusing on whether an entity acts as a state agency makes sense in light of the "principles of federalism and state sovereignty" on which the antitrust state-action doctrine is based. *Hallie*, 471 U.S. at 38. The principle that the authorized actions of an official or agency of the state are those of the sovereign is central to the doctrine of state sovereign immunity under the Eleventh Amendment. *See, e.g., Edelman v. Jordan*, 415 U.S. 651, 663 (1974) (explaining that Eleventh Amendment immunity extends to suits against officials where liability would be paid from public funds). Such sovereign actions are precisely those designed to be exempt from antitrust scrutiny under *Parker*. As this Court explained in that case, the antitrust statutes give "no hint that [they were]

intended to restrain state action or official action directed by a state," and this Court has refused to attribute to Congress an "unexpressed purpose to nullify a state's control over its officers and agents." 317 U.S. at 351.

B. This Court should resolve the circuit split now—in a case that cleanly presents the question that has divided the Courts of Appeals—rather than allow the Fourth Circuit's erroneous decision to impede the operation of state licensing agencies.

First, the question presented is dispositive on the issue of liability. The FTC has issued a final Order, and petitioner has not challenged here the FTC's analysis on the merits of whether, in the absence of immunity, there was a violation of the FTC Act. Petitioner is either immune under the state-action doctrine or liable under the FTC's Order. Moreover, as to the state-action inquiry, the only question is whether active supervision is required. The petition does not question the Fourth Circuit's factual finding that there has been no active supervision in this case. There is also little doubt that the Board acted pursuant to a "clearly articulated" state policy in the sense elaborated in *Hallie*, *i.e.*, that "anticompetitive effects logically would result from [the Board's] broad authority to regulate." 471 U.S. at 42. Thus, this case cleanly presents the legal issue on which the Courts of Appeals have come to disagree.

Second, this case arises in an area of commerce in which the federalism concerns that led the *Parker* Court to narrowly construe the Sherman Act apply with special force. This Court has long recognized that the State's protection of "the health of its citizens is at the core of its police power." *Sporhase v. Neb. ex rel. Douglas*, 458 U.S. 941, 956 (1982). And where federal law is alleged to control in an area that

"the States have traditionally occupied, we start with the assumption that the historic police powers of the States were not to be superseded." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (internal citation and quotation marks omitted); *United States v. Lopez*, 514 U.S. 549, 583 (1995) (Kennedy, J., concurring) (cautioning against "foreclos[ing] the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise"). As a consequence, this case squarely presents an opportunity to resolve a circuit split in a context that demonstrates the significance of the question presented.

Moreover, the need for this Court's guidance is urgent. To wait would not only subject the North Carolina State Board of Dental Examiners to continuing oversight under the FTC's Order; it will interfere with the operation of every state medical and dental board whose members include licensed professionals—which is true of every state medical and dental board in the country. *See infra* Part II. Although parts of the Fourth Circuit's opinion suggest that the holding is limited to states that rely on market participants to select officials—which is sufficient on its own to create a split among the circuits and warrant intervention by this Court—the reasoning cannot be so contained. The Fourth Circuit's rule derives from a general concern about the financial interest of state officials. Pet. App. 14a. In fact, the Court of Appeals indicated that "a state agency operated by market participants must show active state involvement." *Id.* at 15a. Thus, even in states where board members are selected by the governor, for example, there is every reason to believe the FTC or private litigants will wield the Fourth Circuit's decision to justify federal antitrust review of state health policy. At a min-

imum, state licensing boards will tailor their decisions on critical issues of public health with a view towards avoiding costly and intrusive FTC proceedings.

This Court's recent decision in *FTC v. Phoebe Putney Health System, Inc.*, 133 S.Ct. 1003 (2013), underscores the need for this Court's intervention. In that case, this Court held that a Georgia hospital authority did not enjoy state-action immunity because the Georgia legislature had not "affirmatively contemplated that hospital authorities would displace competition." *Id.* at 1011. *Phoebe Putney* rejected a "loose application of the clear-articulation test," *id.* at 1016, to ensure that immunity would attach only "when it is clear that the challenged anticompetitive conduct is undertaken pursuant to a regulatory scheme that 'is the State's own,'" *id.* at 1010 (quoting *Ticor Title*, 504 U.S. at 635). But where, as here, the authorized actions of a duly-constituted state regulatory agency are challenged, the clear-articulation requirement is easily satisfied.

The "very purpose" of regulating professionals is "to displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition, particularly on the part of new entrants." *Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 373 (1991). No further inquiry is, or ought to be, required. As this Court explained in *Omni Outdoor Advertising*, "in light of our national commitment to federalism, the general language of the Sherman Act should not be interpreted to prohibit anticompetitive actions by the States in their governmental capacities as sovereign regulators." *Id.* at 374.

II. THE FOURTH CIRCUIT'S DECISION UNDERMINES THE ABILITY OF STATES TO REGULATE THE HEALTH PROFESSIONS.

The Fourth Circuit affirmed an Order that gives the FTC continuing supervisory authority over the Board for years to come. Pet. App. 150a. Thus, the constraints that can result from the Fourth Circuit's denial of state-action immunity are specific and palpable in this particular case. But the decision's impact is much broader. If permitted to stand, the decision will induce states to change how they regulate health professionals in significant ways. In particular, states cannot expect to be able to rely on highly qualified professionals—as all 50 states do in the fields of medicine and dentistry—to participate in regulating their profession. The risk of antitrust liability—or even costly antitrust investigations—is simply too great for the states and such professionals to bear.

A. States that currently regulate health professionals through agencies whose members are professionals themselves will face a risk of antitrust scrutiny. The risk of FTC scrutiny would place a chill on state regulatory boards and cause harm to the public interest because there could be no confidence that a board's implementation of the applicable state statute would survive second-guessing by the FTC. It is not the job of the FTC—applying the "gauzy cloak" of the federal antitrust laws—to pass judgment on the procedures and policy decisions of a duly constituted agency of state government. But the risk that the FTC will do so is likely to distort state health policy. And the risk that the decision below will be invoked to justify treble damages actions and other proceedings against boards or their members can only further distort regulation.

Suppose, for example, that a state medical board is called upon to determine whether the performance of certain services by a nurse practitioner unsupervised by a physician constitutes the unlicensed practice of medicine. The board may well conclude that, as a matter of medicine, the training of nurse practitioners is such that permitting them to perform these services without adequate physician supervision would pose significant risks to patients. However, knowing that such a decision could expose both the board and its members to litigation by the FTC or a private plaintiff alleging that the decision suppresses competition by nurse practitioners against physicians, the board is more likely to adopt a rule that permits the nurse practitioners to perform services for which the board concludes that they are not qualified.

In such circumstances, state health policy is subordinated to federal antitrust policy, contrary to the principles of *Parker*. The federal antitrust laws were not enacted, and should not be permitted, to subvert good faith medical and dental decisions regarding what is in the best interests of patients and the public. In this connection, it is worth noting that this Court has recognized that even private professional self-regulation can promote competition in a market in which consumers have difficulty monitoring the quality of services available. *See Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 772-74 (1999).

At bottom, the decision below reflects a profound mistrust of the state democratic process. If a state legislature enacts laws that are not in the interest of the public in that state, the cure lies in the electoral process. If a state board whose members are market participants acts in the interests of their fellow practitioners rather than in the interests of the public,

the remedy lies in the state legislature—where either the substance of a regulation or the composition of the board can be changed by majority vote. Private actors are not subject to electoral or legislative scrutiny; state-created regulatory agencies (including agencies comprised of market participants) are. It is the democratic process, not decisions of antitrust enforcers far removed from the realities of the practice of a profession in a state, that should protect the public interest in the regulation of professionals by a state agency.

B. The decision below undercuts state regulation of the professions in yet another way. If state regulatory boards are subject to the federal antitrust laws on the theory that their members are private actors, then those members may fear that they will be exposed to personal liability for treble damages.[4] *See* 15 U.S.C. § 15(a) (providing that persons injured by antitrust violations "shall recover threefold the damages" they sustain). In effect, they would reasonably be concerned that they will be treated no differently from private conspirators attempting to line their own pockets by price fixing schemes, territorial allocations, or similar economically self-serving conduct. In the circumstances, why would any conscientious practitioner ever volunteer to serve on a state regulatory board in an area in which he or she practices? The risks of personal liability are simply too great.

The same considerations that underlie the doctrine of official immunity apply equally here. That doc-

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[4] Although the members of a state regulatory board ought to be immune from suit for their official actions under the Eleventh Amendment, they might reasonably fear that sovereign immunity will be denied. *See, e.g., Versiglio v. Bd. of Dental Exam'rs of Ala.*, 651 F. 3d 1272 (11th Cir. 2011) (denying immunity).

trine is based on the proposition that the public is best served when government officials are not subject to personal liability for action taken in good faith. *See, e.g., Butz v. Economou*, 438 U.S. 478, 506 (1978) (emphasizing "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority"). Otherwise, as noted above, the officials will be constrained from making the hard decisions lest they be exposed to personal damages actions. Yet exposure to the threat of treble damages actions is precisely what members of state boards will face if the decision below is not reviewed and reversed.

As national and state associations of practitioners who serve on state regulatory boards in health care and as the associations of such boards, *amici* represent to this Court that this case is being closely watched by those who might be called upon to serve their states. If this case is permitted to stand, the foreseeable result is that many highly qualified practitioners who would otherwise be willing to serve on boards will either resign or refuse to accept office lest they face significant personal antitrust exposure. For that reason, this Court should not wait for another vehicle to resolve the circuit conflict. Rather, it should take this case and make clear that the authorized actions of state regulatory boards and their members are immune from the federal antitrust laws even if those boards are comprised of market participants.

C. In this suit, the FTC has been allowed to override a substantive policy decision of a state agency. In addition, it has eviscerated the decision of a state legislature on the composition and method of selection of members the state's regulatory agency. These

results are directly contrary to the teachings of this Court in *Parker v. Brown* and subsequent state action cases.

For years, the FTC has recommended that states "broaden the membership of state licensure boards," based on the FTC's view that boards of practicing professionals are more likely to "engage in conduct that unreasonably increases prices or lowers access to health care." U.S. Dep't of Justice & FTC, *Improving Health Care: A Dose of Competition* 22 (July 2004), *available at* http://www.justice.gov/atr/public/health_care/204694.pdf. But many states—including North Carolina—have different views of what is in the interest of their citizens. These states have chosen to rely on boards that include practicing professionals to regulate many health professions.

By conditioning state-action immunity on the structure and composition of the state agency in question, the decision below pushes the states to refashion their administrative agencies in the FTC's image. This result is inconsistent with the principles of federalism articulated in *Parker* and embodied in the Constitution. Notwithstanding the supremacy of federal law, the federal government does not have the power to force state agencies to advance federal policy. *See, e.g.*, *New York v. United States*, 505 U.S. 144, 162 (1992) ("[T]he Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions."). The authorized actions of a duly constituted state agency should be immune from second-guessing under the federal antitrust laws, regardless of whether the state agency is organized as the FTC would like it to be.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 27, 2013

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AMICUS CURIAE BRIEF

No. 13-534

IN THE

Supreme Court of the United States

THE NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS,
Petitioner,

v.

FEDERAL TRADE COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE NORTH CAROLINA STATE BAR, THE NORTH CAROLINA BOARD OF LAW EXAMINERS, THE WEST VIRGINIA STATE BAR, AND THE FLORIDA BAR, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

THE NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF THE NORTH CAROLINA STATE BAR, THE NORTH CAROLINA BOARD OF LAW EXAMINERS, THE WEST VIRGINIA STATE BAR, AND THE FLORIDA BAR, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*[1]

Amicus The North Carolina State Bar (the "State Bar") is a regulatory body created by the North

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[1] Pursuant to Supreme Court Rule 37.2(a), at least 10 days prior to the due date of this brief, counsel for *amici curiae* notified counsel of record for all parties of its intention to file this brief. The parties have consented to the filing of this brief and letters of consent from all parties have been submitted to the Clerk. Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici curiae* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

Carolina General Assembly. It is mandated by statute to regulate the practice of law in North Carolina and thereby protect the public. The State Bar's regulatory functions include formulating and adopting rules of professional ethics and conduct; investigating and prosecuting matters of professional misconduct; preventing or stopping the unauthorized practice of law; distributing compensation to members of the public harmed by professional misconduct; and obtaining injunctions to prevent professional misconduct, including freezing the trust accounts of lawyers believed to have misappropriated entrusted funds. N.C. Gen. Stat. §§ 84-23(a), 84-28(f), (j), 84-37 (2011). Extensive safeguards ensure that parties are provided an appropriate and fair process before being subjected to regulatory action.[2]

The State Bar's authority is vested in the State Bar Council (the "Council"), which is composed of 61 lawyers elected from judicial districts across North Carolina, four officers (who must be lawyers), and three public members (the "Councilors"). *Id.* § 84-17.

The regulatory responsibilities and composition of the State Bar are similar to those of the petitioner Dental Board and numerous other statutorily-created

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[2] *See, e.g.*, 27 N.C. Admin. Code 01B .0111(b)-(d), .0112, .0113, .0200 (investigation, notice, and opportunity to respond to allegations of professional misconduct); *id.* 01B .0114, .0115, .0116, .0118, .0123 (procedures for discipline and disability hearings); *id.* 01D .0201, .0202, .0203, .0204, .0205, .C206, 01E .0313 (procedures before the Authorized Practice Committee); *id.* 01D .0707 (procedures for resolution of disputed fees); *id.* 01D .0903, .1001 (procedures before Administrative Committee); *id.* 01D .1417, .1418, .1419 (procedures for Client Security Fund); *id.* 01D .1801 (hearing and appeal rules of the Board of Legal Specialization); *id.* 01G .0122 (review and appeal of denial of paralegal certification).

state regulatory bodies, in North Carolina and other states, that are composed entirely or primarily of practicing professionals. The State Bar is well-positioned to inform the Court regarding the broad and harmful practical implications of the decision below for the State Bar and for similar state bars.

The state bar of West Virginia, The Florida Bar, and the North Carolina Board of Law Examiners join the State Bar as co-*amici*. Each of the state-bar co-*amici*, like the State Bar, regulates the practice of law through a governing body composed primarily of lawyers. (The Florida Bar's governing body, like that of the State Bar, is elected by other lawyers within the state.) Because the State Bar, the North Carolina Board of Law Examiners, and the West Virginia Bar operate within the Fourth Circuit, all are bound by the decision below. Florida's is an example of a bar outside the Fourth Circuit that is concerned about the broader effects of the Fourth Circuit's decision.

The North Carolina Board of Law Examiners is responsible for the admission and licensure of attorneys to practice in North Carolina, in accordance with rules and regulations that it promulgates. *See* 27 N.C. Admin. Code 01C. The members of the North Carolina Board of Law Examiners are all lawyers whom the State Bar elects. N.C. Gen. Stat. § 84-24. This brief focuses on the facts concerning North Carolina and its State Bar for illustrative purposes.

Under the Fourth Circuit's decision, the State Bar and its Councilors will face antitrust claims asserted by disgruntled lawyers and by non-lawyers whose conduct constitutes the unauthorized practice of law. Each year, the State Bar handles approximately 1,400 grievances involving lawyer misconduct, about 100 matters involving the unauthorized practice of law, and about 40

contested disciplinary cases. *See, e.g.*, Report of the Office of Counsel to the N.C. State Bar Council (Oct. 18, 2013), http://www.ncbar.gov/PDFs/Council_report.pdf.

The State Bar's exercise of its regulatory authority results in its continually being involved in litigation, as both plaintiff and defendant. For example, as of its October 25, 2013 quarterly meeting, the State Bar was a party to one pending lawsuit challenging the imposition of discipline on a lawyer; two lawsuits alleging the State Bar harmed the plaintiffs by failing to impose discipline on lawyers; and three lawsuits, pending in the North Carolina Business Court, seeking to nullify charges of the unauthorized practice of law. In all three Business Court cases the opposing party has asserted claims under the North Carolina Constitution for purported monopolization. *See* Complaint for Declaratory and Injunctive Relief at 12, *World Law South, Inc. v. N.C. State Bar*, No. 13 CVS 11048 (N.C. Super. Ct. filed Aug. 19, 2013); Amended Answer and Counterclaim at 7, *N.C. State Bar v. Janis Lundquist and Lienguard, Inc.*, No. 11 CVS 7288 (N.C. Super. Ct. filed Nov. 20, 2012); Complaint for Declaratory and Injunctive Relief at 18, *LegalZoom.com, Inc. v. N.C. State Bar*, No. 11 CVS 15111 (N.C. Super. Ct. filed Sept. 30, 2011) (*all available at* http://www.ncbusinesscourt.net/TCDDotNetPublic/). The Fourth Circuit's decision will entice the State Bar's opponents in similar controversies to assert Sherman Act claims in federal court (under 28 U.S.C. § 1337(a)), making it more costly and difficult for the State Bar to protect the public from harm.

SUMMARY OF ARGUMENT

Under the decision below, "when a state agency is operated by market participants who are elected by other market participants, it is a 'private' actor" that

is not entitled to state action immunity from federal antitrust laws unless it is "actively supervised" by other state officials. *N.C. State Bd. of Dental Exam'rs v. FTC*, 717 F.3d 359, 370, 375 (4th Cir. 2013). (The decision notes, however, that "more quintessential state agencies" are not precluded "from arguing that they need not satisfy the active supervision requirement." *Id.* at 367 n.4.) The resulting exposure of those charged by the state with regulating professionals—and their board or council members—to antitrust claims (and, potentially, to awards of treble damages and attorney fees, and to criminal liability) is likely to undermine the functioning of those state regulatory bodies, including those with appointed as well as elected members.

The Fourth Circuit's decision threatens an important and sovereign state interest: the choice by a state to regulate state-licensed professionals by state bodies composed primarily of those practicing the same profession (or, at least, ones who are *elected* by their fellow professionals). By denying these state regulators state action immunity unless they show active supervision by other parts of state government, thereby subjecting these regulatory bodies, and those who serve as their officials, to potential antitrust liability, the decision impairs their ability to enforce state laws enacted to protect the public.

Four significant ways in which such harm is likely to result are: (i) limited resources available to prosecute lawyer misconduct and to prevent the unauthorized practice of law will be diverted to litigating whether a state bar is a "more quintessential state agency" entitled to state action immunity or has been actively supervised in a manner sufficient to provide state action immunity; (ii) if state action immunity is found not to exist, state bars will have to

use limited resources to defend expensive antitrust actions even though states explicitly authorize the state bars to regulate the conduct being challenged; (iii) lawyers will be reluctant to serve as bar councilors for fear of being named individually in antitrust actions; and (iv) councilors may be deterred from fulfilling their state-authorized enforcement duties against well-heeled defendants who threaten antitrust claims.

Aside from these severe practical problems, the decision is an unprecedented departure from this Court's decisions and those of other Circuit Courts concerning the antitrust state action doctrine. Moreover, the decision radically subverts the principles of federalism that underlie the state action doctrine.

The State Bar requests that this Court grant the Dental Board's petition for certiorari so that the Court may decide the important question presented in the Dental Board's petition:

> Whether, for purposes of the state-action exemption from federal antitrust law, an official state regulatory board created by state law may properly be treated as a "private" actor simply because, pursuant to state law, a majority of the board's members are also market participants who are elected to their official positions by other market participants.

Pet. i.

ARGUMENT

I. THE DECISION BELOW WILL SEVERELY DISRUPT THE ABILITY OF THE STATE BAR AND SIMILAR STATE ENTITIES TO FULFILL IMPORTANT MANDATES OF THE STATE.

The Fourth Circuit holds that "when a state agency is operated by market participants who are elected by other market participants, it is a 'private' actor," and therefore must be actively supervised by other state officials to receive state action immunity (while also stating that its "opinion should not be read as precluding" an otherwise undefined category of "more quintessential state agencies," not "composed entirely of private market participants," from "arguing that they need not satisfy the active supervision requirement"). *N.C. State Bd. of Dental Exam'rs*, 717 F.3d at 370, 367 n.4. Absent such supervision, no action of a state body run by elected professionals would appear to be reliably protected by state action immunity, even if the conduct is authorized by state statute or a state's constitution.[3] That holding is extraordinarily broad, reaching far beyond the specific facts presented.

It is the states, of course, that license lawyers and many other professionals to practice within their borders, and the states, accordingly, bear the important responsibility to regulate those professionals and protect the public from serious harm they might

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[3] An example of such a statute is N.C. Gen. Stat. § 84-23(a) (requiring that the Council of the State Bar "shall administer this Article; take actions that are necessary to ensure the competence of lawyers [and] investigate and prosecute matters of professional misconduct").

do. Indeed, in *Hoover v. Ronwin*, 466 U.S. 558, 580 n.34 (1984), concerning the regulation of bar applicants, this Court characterized such regulation as an "essential public service."

To meet this responsibility, every state must implement a regulatory regime that has the expertise necessary to identify, analyze, understand, and resolve the issues that arise with respect to the profession being regulated. With respect to lawyers, the General Assembly of North Carolina, for example, has determined, understandably, that practicing lawyers are in the best position to implement the state's interest in regulating the legal profession. Likewise, North Carolina and other states have determined that numerous other professions, such as medicine and dentistry, require regulation by practicing members of the profession. *See, e.g., Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 772 (1999) ("lay public" often "is incapable of adequately evaluating" issues that require the "specialized knowledge" of professionals) (citation omitted); *In re Guess*, 393 S.E.2d 833, 837 (N.C. 1990) ("Certain aspects of regulating the medical profession plainly require expertise beyond that of a layman.").

North Carolina's General Assembly has also determined that the appropriate means of selecting the lawyers who are qualified and willing to bear that responsibility is to have them run for election by their peers in the judicial districts in which they practice, where their abilities, character, and reputations are best known. *See* N.C. Gen. Stat. § 84-18(b). Finally, the North Carolina General Assembly has chosen not to impose on the State Bar and other expert professional agencies, such as the Dental Board, an

unnecessary, intrusive, and inefficient extra layer of oversight by some other arm or agent of the State.

The Fourth Circuit's decision thus radically undermines North Carolina's, and other states', state-mandated professional regulatory regimes and their sovereign interests and choices with respect to bringing the necessary expertise to the regulation of law, dentistry, and numerous other professions. In particular, the Fourth Circuit's narrowing of the state action exemption will give litigants against the State Bar and similar bars and other agencies every incentive to assert Sherman Act claims to complicate or block enforcement actions, thereby impeding their ability to protect the public. For example, it is not unusual for disbarred lawyers to try to continue to practice under the guise of being paralegals; some surely will use the Fourth Circuit's decision to attack the efforts of the State Bar to bring enforcement proceedings against them.

Especially disruptive is the likelihood that individual Councilors and individual board members of similar agencies will be sued for alleged Sherman Act violations. It is already challenging to find lawyers who have earned the trust and confidence of their peers, who are willing to run for election, and who are willing to give up several weeks a year to serve as State Bar Councilors, especially in view of the absence of any compensation (aside from a $50 per diem for quarterly Council meetings, *In re The Council of the N.C. State Bar* (N.C. March 7, 1996) (on file with the State Bar)). The prospect of facing federal anti-trust claims will increase that challenge and will make Councilors—and board members of similar agencies—reluctant to take the decisive actions necessary to fulfill their statutory duties.

In *Hoover*, this Court recognized the seriousness of this chilling effect. Having noted that "[p]etitioners were named as defendants in the suit in their capacity as individual members of" Arizona's bar examination committee, *Hoover*, 466 U.S. at 565, the Court wrote:

> Ronwin has brought a suit for damages under the Sherman Act, with the threat of treble damages. There can be no question that the threat of being sued for damages—particularly where the issue turns on subjective intent or motive—will deter 'able citizens' from performing this essential public service.

Id. at 580 n.34 (citation omitted).

State action immunity allows antitrust claims against state agencies to be disposed of at an early stage. The Fourth Circuit's decision, however, would require litigation at least over whether a state bar is a "more quintessential state agency" or the subject of sufficiently active state supervision to warrant state action immunity, and, if the state bar loses on those issues, would enable the antitrust claim to proceed much further—perhaps to a trial under the complex rule of reason or under the more plaintiff-friendly *per se* or "quick look" tests described in the opinion. *N.C. State Bd. of Dental Exam'rs*, 717 F.3d at 373-74. As this Court noted with concern in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 558 (2007), antitrust litigation is complex and expensive. It threatens defendants with treble damages and awards of attorney fees, 15 U.S.C. § 15, and even raises the prospect of "the criminal liability of public officials." *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 373 n.4 (1991). Further, liability insurance may not be available to mitigate the risks and defray the cost of

defending these claims. *E.g., Rose Acre Farms, Inc. v. Columbia Cas. Co.*, 662 F.3d 765, 769 (7th Cir. 2011) (excluding antitrust claims from insurance coverage because "[p]articipation in a conspiracy to violate federal antitrust law is both deliberate and criminal"). Instead of applying its limited resources to protect the public, the State Bar will now have to expend them litigating antitrust claims.

The Fourth Circuit suggests that the State can somehow provide "active supervision." *N.C. State Bd. of Dental Exam'rs*, 717 F.3d at 370. The notion of subjecting state agencies to "active supervision" by the legislature or judiciary, or by state officials who are not "market participants," would be impractical, cumbersome, and inefficient. A redundant bureaucracy would serve little purpose given the separate requirement that "the challenged restraint be 'one clearly articulated and affirmatively expressed as state policy' " *Cal. Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (citation omitted). Moreover, because the regulation of professionals frequently involves what this Court has termed "the specialized knowledge required to evaluate the services" at issue, beyond the expertise of the "lay public," *Cal. Dental Ass'n*, 526 U.S. at 772 (citation omitted), non-practicing state bureaucrats may be unable to provide meaningful or competent oversight in any event.

Adding that new level of bureaucracy also would fail to cure the practical problem that the decision below creates. Under current doctrine, agencies "may not know until after their [conduct] has occurred (and indeed until after their trial has been completed) whether the State's supervision will be 'active' enough." *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621,

641 (1992) (Scalia, J., concurring). This lingering uncertainty over the outcome of antitrust lawsuits would be enough to dissuade professionals from serving as agency officials and would further impair an agency's ability to fulfill its statutory mandate. Thus, even if a state were willing to adopt some sort of regime to supervise its expert regulatory agencies, doing so would fail to dispel the chilling effect, about which this Court warned in *Hoover*, on professionals' willingness to perform "this essential public service." 466 U.S. at 580 n.34.

Moreover, the Fourth Circuit's broad reasoning is not logically limited to agencies whose boards are composed of *elected* professionals. As the Fourth Circuit wrote, "[a]t the end of the day, this case is about a state board run by private actors in the marketplace." *N.C. State Bd. of Dental Exam'rs*, 717 F.3d at 375. This concern extends to any state agency "run by" members of the profession being regulated, no matter how those members are selected. The decision does not state or identify how appointed board members and elected board members would behave differently in regulating their peers. (Indeed, the Federal Trade Commission's opinion denying state action immunity to the Board held that "a state regulatory body that is controlled by participants in the very industry it purports to regulate must satisfy both prongs of *Midcal* to be exempted from antitrust scrutiny under the state action doctrine"—*without regard* to the method by which the members were selected. Pet.App. 58a.) Thus, numerous state regulatory bodies composed of professionals *appointed* to regulate their peers—including, in North Carolina alone, the North Carolina Boards of Architecture, N.C. Gen. Stat. § 83A-2, General Contractors, *id.* § 87-2, and Medicine, *id.* § 90-2—face the potential loss of the

state action exemption, upsetting their functioning as well.

Finally, the Fourth Circuit decision is vague and unhelpful with respect to exactly the proportion of board members that may be private market participants before its new rule will apply. This ambiguity alone will spawn costly litigation. The court variously indicates that its decision applies to state agencies in which market participants constitute a "decisive coalition (*usually* a majority)," *N.C. State Bd. of Dental Exam'rs*, 717 F.3d at 368 (emphasis added) (citation omitted), and to agencies that are "operated by," *id.* at 370, or "run by," *id.* at 375, such market participants. We can only guess about the circumstances in which a "coalition" composed of other than a majority of market participants might be enough to come within the reach of the decision or about what, exactly, it means for an agency to be "operated by" or "run by" such market participants. There is much fodder for litigation here.

Even less helpful to the agencies, and their members, that are potential Sherman Act defendants is the Fourth Circuit's observation that "more quintessential state agencies" may still argue "that they need not satisfy the active supervision requirement," *id.* at 367 n.4. The concept of "quintessentiality" is a new addition to the law of state action immunity, and it is not clear why a state agency created by statute performing within its statutory mandate would not be seen as "quintessential" in the first instance. If this comment about "more quintessential state agencies" is intended to suggest a test or standard, then it is too vague to be useful. The decision below does not indicate what factors might

bear on quintessentiality, and litigation to explore them will ensue.

II. THE DECISION BELOW CONFLICTS WITH THE NINTH CIRCUIT DECISION AFFORDING STATE ACTION IMMUNITY TO THE OREGON STATE BAR.[4]

The Fourth Circuit's decision conflicts with the leading Ninth Circuit decision that the Fourth Circuit purports to distinguish, *Hass v. Oregon State Bar*, 883 F.2d 1453 (9th Cir. 1989). What the Fourth Circuit found dispositive, in concluding that the Dental Board was not entitled to state action immunity, was that the Dental Board was "a state agency operated by market participants who are elected by other market participants." *N.C. State Bd. of Dental Exam'rs*, 717 F.3d at 370. In *Hass*, the board of the Oregon State Bar had exactly those characteristics, being composed of lawyers elected by the other lawyers practicing in the state, 883 F.2d at 1460 n.3, yet the Ninth Circuit reached the opposite conclusion, holding that the Oregon State Bar *was* entitled to state action immunity, *id.* at 1461. The Fourth Circuit attempts to distinguish *Hass* by portraying that decision as being bound by its facts, writing that the Ninth Circuit had "merely determined that the particular state agency at

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[4] The Fourth Circuit's decision also conflicts with the Fifth Circuit's decision in *Earles v. State Bd. of Certified Pub. Accountants of Louisiana*, 139 F.3d 1033 (5th Cir. 1998), and with this Court's own decisions concerning the antitrust state action doctrine, as the Dental Board discusses in detail in its Petition for Certiorari at pages 13-31. This brief will focus only on *Hass*, in that *Hass* involves an official state bar that is afforded the state action immunity that the Fourth Circuit's decision would deny to the State Bar, the North Carolina Board of Law Examiners, The Florida Bar, and the West Virginia Bar.

issue was more akin to a municipality than a private actor." *N.C. State Bd. of Dental Exam'rs*, 717 F.3d at 369 n.6. Nevertheless, the facts concerning the Dental Board and the board of the Oregon State Bar are identical with respect to the only facts that ultimately mattered to the Fourth Circuit, so the cases squarely conflict.

Also directly contrary to the Fourth Circuit, the Ninth Circuit saw the election of the agency's board as a factor *supporting* the treatment of the bar as a public body entitled to state action immunity, reasoning that the elections served as a "'check' [on] the actions of the [b]oard." *Hass*, 883 F.2d at 1460 n.3. Moreover, the additional reasons the Ninth Circuit gave for treating the Oregon State Bar as a state actor apply with equal force not only to North Carolina's Dental Board, but also to the State Bar. *Hass* emphasized that the Oregon Bar "is an agency of the state of Oregon organized to regulate the practice of law for the benefit of the public" (*see* N.C. Gen. Stat. § 84-15 (the State Bar is "created as an agency of the State of North Carolina")), the governing body of which has "nonlawyer members of the public" (*see id.* § 84-17 (the Council shall have "three public members not licensed to practice law in this or any other state")), and whose members "must comply with the Code of Ethics enacted by the state legislature to guide the conduct of all public officials" (the North Carolina State Ethics Commission has designated the State Bar as a board subject to all the provisions of the State Government Ethics Act, *id.* § 138A-3(1c); http://www.ethicscommission.nc.gov/coverage/coveredBoards.aspx). *Hass*, 883 F.2d at 1460. While the Fourth Circuit's decision would appear to deny the State Bar state action immunity (unless it can

show active supervision or qualify under the "quintessentiality" standard), *Hass* clearly would not.

Hass cannot be reconciled with the decision below, even though the decision strains to do so. Nor has any other federal appeals court, aside from the Fourth Circuit, held that an official state agency must meet the active state supervision requirement. Thus, agencies of states within the Ninth Circuit, and other circuits, are entitled to state action immunity that the Fourth Circuit's decision will deny to the State Bar and similar agencies of states within the Fourth Circuit.

III. THE FOURTH CIRCUIT'S DECISION RADICALLY SUBVERTS THE VALUES OF FEDERALISM ON WHICH THE STATE ACTION DOCTRINE IS FOUNDED.

By interfering with a state's sovereign choices concerning the structure, composition, and supervision of professional regulatory boards, and by making those choices subject to review in the federal courts, the decision below radically subverts the values of federalism that underlie the state action doctrine. This Court's review is needed to uphold these principles of federalism as well as to resolve a conflict between the Circuits and to avoid the serious practical harm the decision below threatens to cause.

The Fourth Circuit writes that subjecting a state regulatory body to liability under the Sherman Act presents "no federalism issue" because of the "conclusion that the Board is a private actor under the antitrust laws." *N.C. State Bd. of Dental Exam'rs*, 717 F.3d at 375. But this choice to treat a state agency created by and acting pursuant to state statute as a private actor, by itself, necessarily raises federalism

issues. *Parker v. Brown*, 317 U.S. 341, 351 (1943) ("The Sherman Act . . . gives no hint that it was intended to restrain state action or official action directed by a state."); *see also Omni*, 499 U.S. at 374 ("The rationale of *Parker* was that, in light of our national commitment to federalism, the general language of the Sherman Act should not be interpreted to prohibit anticompetitive actions by the States in their governmental capacities as sovereign regulators.").[5]

In *Hoover*, *supra*, this Court explained precisely how the principles of federalism on which *Parker* is founded would be undermined if state entities (there, Arizona's bar examination committee) were subjected to antitrust liability:

> The reasoning adopted by the dissent [in *Hoover*] would allow Sherman Act plaintiffs to look behind the actions of state sovereigns and base their claims on perceived conspiracies to restrain trade among the committees, commissions, or others who necessarily must advise the sovereign. Such a holding would emasculate the *Parker v. Brown* doctrine. For example, if a state legislature enacted a law based on studies performed, or advice given, by an advisory committee, the dissent would find the State exempt from Sherman Act liability but not the committee. A party dissatisfied with the new law could

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[5] Treating a state agency as a "private actor" not only would deprive state agencies and officials of state action immunity, but would also cast doubt on the availability of other immunities, such as immunity under the Eleventh Amendment. A clear benefit of the state action doctrine is to avoid sending antitrust litigation, complex as it is, into the thicket of other official immunity doctrines.

> circumvent the state-action doctrine by alleging that the committee's advice reflected an undisclosed collective desire to restrain trade without the knowledge of the legislature. The plaintiff certainly would survive a motion to dismiss—or even summary judgment—despite the fact that the suit falls squarely within the class of cases found exempt from Sherman Act liability in *Parker*.

466 U.S. at 580.

The Fourth Circuit's decision will cause exactly the harms this Court warned against in *Hoover*. The decision displaces a state's sovereign authority to determine how best to regulate professionals who practice in the state, and undermines the state's judgment that boards composed primarily of practicing professionals, elected by fellow professionals, are, because of their expertise, best qualified and able to exercise the state's regulatory authority. The decision also intrudes on state sovereignty by essentially compelling states, against their experience, will, and judgment, to impose on professional regulatory boards an unwieldy, intrusive, and unnecessary administrative mechanism to "actively supervise" the boards' actions, so that the boards will qualify for state action immunity and thus remain able to attract qualified professionals to serve on them.

IV. IT IS UNNECESSARY TO DEPRIVE STATE ENTITIES OF STATE ACTION IMMUNITY TO GIVE AGGRIEVED PARTIES AN ADEQUATE REMEDY FOR ANY MISCONDUCT.

The imposition of potential antitrust liability is not needed to protect or vindicate the rights of aggrieved parties. To the contrary, this Court has warned explicitly against the "transformation of state administrative review into a federal antitrust job." *Omni*, 499 U.S. at 372. Thus, *Bates v. State Bar of Arizona*, 433 U.S. 350, 363, 383 (1977) upheld the application of state action immunity to the Arizona State Bar's enforcement of a ban on advertising by attorneys, while striking down the ban on other grounds. The Court recognized that subjecting the Arizona State Bar to antitrust liability was not necessary to remedy any alleged departures from state law.

The same is true here. In North Carolina, for example, aggrieved individuals may seek declaratory or injunctive relief or the enforcement of constitutional rights in Superior Court pursuant to N.C. Gen. Stat. § 7A-245. *See, e.g., Gilbert v. N.C. State Bar*, 678 S.E.2d 602, 612 (N.C. 2009) (noting that "the superior court division has original subject matter jurisdiction over constitutional claims"). Many agencies are subject to contested case proceedings under N.C. Gen. Stat. § 150B-23 to resolve claims that those agencies acted improperly or in excess of their authority. Finally, a petition for a writ of mandamus likewise may address any state-law excesses or compel the performance of official duties. *Sutton v. Figgatt*, 185 S.E.2d 97, 99-100 (N.C. 1971).

CONCLUSION

The Fourth Circuit's decision ignores Supreme Court precedent, creates a circuit split, and gravely intrudes upon the regimes that states have created to enforce laws governing regulated professionals, such as lawyers, doctors, dentists, physical therapists, pharmacists, engineers, and architects. The decision ignores federalism, frustrating the sovereign and commonsense choice of states (i) to entrust regulation of professionals to entities composed primarily of officials who are also "market participants," (and who thus have the requisite expertise), and (ii) not to seek somehow to "actively supervise" those expert bodies with another level of bureaucracy. By disrupting state regulatory regimes and by facilitating antitrust claims by persons subject to regulation, the decision will impair the ability of the State Bar and other professional regulatory entities to protect the public.

For all of the foregoing reasons, the Dental Board's petition for certiorari should be granted.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 13-534

In the Supreme Court of the United States

THE NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF *AMICI CURIAE* STATE OF WEST VIRGINIA AND 9 OTHER STATES IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether, for purposes of the state-action exemption from federal antitrust law, an official state regulatory board created by state law may properly be treated as a "private actor" simply because, pursuant to state law, a majority of the board's members are also market participants who are elected to their official positions by other market participants.

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*[1]

Certiorari is warranted to redress the serious and immediate harms caused to States by the Fourth Circuit's decision. As Petitioner North Carolina State Board of Dental Examiners (the "NC Dental Board") explains, the Fourth Circuit's decision has created a circuit split and contravenes Supreme Court precedent. *Amici* States submit this brief to stress that the Court should resolve this jurisprudential conflict forthwith because the Fourth Circuit's decision causes immediate harm to the States in at least two ways.

First, the circuit split created by the decision violates the principle of equal sovereignty among the States. There are now different rules throughout the country with respect to how States may exercise their sovereignty in creating regulatory boards. This varying discretion contravenes the foundational principle that the States are coequal sovereigns with identical authority to manage their internal affairs.

Second, States will suffer harm adapting to the Fourth Circuit's erroneous rule. *Amici* States have all exercised their sovereign authority to create regulatory boards that, like the NC Dental Board, include members that are also market participants. These boards—which include lawyer disciplinary boards, state medical and nursing boards, as well as boards overseeing architects and acupuncturists,

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[1] Pursuant to Supreme Court Rule 37.2(a), the State of West Virginia has timely notified counsel of record of its intent to file an amicus brief in support of Petitioners.

psychologists and physical therapists, dentists and dieticians—serve many important state regulatory functions, including protecting the public from unqualified and unsavory individuals. The presence of market participants on the boards provides critical benefits. As a result of their education, training and experience, these market participants have considerable expertise in their respective fields. This specialized knowledge allows for greater precision in regulation and also permits regulation to remain current as practices and standards of care advance.

In response to the Fourth Circuit's decision, and motivated by a desire to minimize the threat of lawsuits from both private parties and the Federal Trade Commission ("FTC"), these state boards and state legislatures will begin to take steps to alter the way they use market participants, if they continue to use them at all. West Virginia boards have already been hampered by the decision, to the detriment of the citizens they are charged with protecting. In time, state legislatures will reconfigure their regulatory boards, either by adding more costly and inefficient bureaucracy, or by eliminating reliance on the valuable expertise of market participants entirely.

The petition should be granted to restore equal sovereignty among the States and prevent unnecessary and harmful changes to state governance.

REASONS FOR GRANTING THE PETITION

I. THE FOURTH CIRCUIT'S DECISION CREATED A CIRCUIT SPLIT THAT VIOLATES THE EQUAL SOVEREIGNTY OF THE STATES.

A. The Fourth Circuit's Decision Conflicts with Decisions of the Fifth and Ninth Circuits.

As the NC Dental Board explains, the Fourth Circuit's decision squarely conflicts with the decisions of other federal circuit courts applying the antitrust state-action doctrine. Petition 13-18. The Fourth Circuit concluded below that state boards "in which a decisive coalition (usually a majority) is made up of participants in the regulated market, who are chosen by and accountable to their fellow market participants, are private actors and must meet both *Midcal* prongs" to qualify for the state-action doctrine. Pet. App. 14a (internal citation omitted) (referencing *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980)) Even where such a board is acting pursuant to a "clearly articulated" state policy, the court of appeals reasoned, the board must be "actively supervised" by the State to ensure that it has exercised "'sufficient independent judgment and control.'" *Id.* at 15a (quoting *Federal Trade Comm'n v. Ticor Title Ins. Co.*, 504 U.S. 621, 634 (1992)). According to the Fourth Circuit, "a state agency operated by market participants must show active state involvement." *Id.*

The Fifth and Ninth Circuits have reached the opposite conclusion. In *Earles v. State Board of*

Certified Public Accountants of Louisiana, the Fifth Circuit determined that the State Board of Certified Public Accountants—a board "composed entirely of CPAs who compete in the profession they regulate" and who are effectively chosen by their market peers—did not need to satisfy the "active supervision" prong of *Midcal*. 139 F.3d 1033, 1041 (5th Cir. 1998). And in *Hass v. Oregon State Bar*, the Ninth Circuit reached the same decision about the Board of Governors of the State Bar—a board composed predominantly of attorneys elected by their market peers. 883 F.2d 1453, 1460 n.3 (9th Cir. 1989). Indeed, unlike the Fourth Circuit, the Ninth Circuit expressly found the board members' accountability to their fellow market participants to be a reason *not* to require active state supervision. *See id.* at 1460 n.3 ("[T]he members of the Oregon State Bar ... have the ability to 'check' the actions of the Board by the electoral process.").

These cases are irreconcilable. There is no doubt that the Fourth Circuit would require active state supervision of the boards at issue in *Earles* and *Hass*. Like the NC Dental Board, those boards were "operated by market participants" and thus would be found to lack "sufficient independent judgment and control." Pet. App. 15a. They are even similar to the NC Dental Board in that their market-participant members were chosen in some respect by other market participants—by election in *Hass* and by nomination of an exclusive slate of candidates in *Earles*. *Hass*, 883 F.2d at 1460 n.3, *Earles*, 139 F.3d at 1035. This last point is not critical to the Fourth Circuit's reasoning, as the NC Dental Board

explains, *see* Pet. 22-24, but it further highlights the conflict between the courts.

B. The Conflicting Decisions Create Different Rules Regarding State Governance in Contravention of the States' Equal Sovereignty.

Setting aside their merits, these conflicting opinions cannot be permitted to persist because their mere existence renders the States unequal sovereigns. There are now different rules throughout the country with respect to how States may govern themselves. The States within the Fifth and Ninth Circuits have discretion to choose, simply by clear articulation of state policy, to endow a board of market participants with the power to regulate that particular market. *See also* Pet. 17 n.1. States in the Fourth Circuit, however, are saddled with an additional burden. If they desire to entrust a board of market participants with the State's regulatory power, they must "actively" supervise that board. States in circuits that have not expressly addressed this question will have to determine their own level of risk tolerance, which may lead some to continue following *Hass* and *Earles*, others to begin complying with the FTC's position as adopted by the Fourth Circuit, and some to avoid relying on market participants entirely until the state of the law is resolved.

The varying discretion among the States contravenes the bedrock principle that the States "are *coequal* sovereigns under the Constitution." *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215, 1227 (2012) (emphasis added). Since the Founding,

it has been the nation's "historic tradition that all the States enjoy 'equal sovereignty.'" *Nw. Austin Mun. Util. Distr. No. One v. Holder*, 557 U.S. 193, 203 (2009) (quoting *United States v. Louisiana*, 363 U.S. 1, 16 (1960)). For example, each State was granted equal representation in the Senate—a body that "derive[d] its powers from the States, as political and coequal societies." The Federalist No. 45, at 289 (J. Madison) (Clinton Rossiter ed., 1999). This country "was and is a union of states, equal in power, dignity, and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself." *Coyle v. Smith*, 221 U.S. 559, 567 (1911); *see also Pennoyer v. Neff*, 95 U.S. (5 Otto) 714, 722 (1877) ("The several States are of equal dignity and authority. "), *overruled in part on other grounds by Shaffer v. Heitner*, 433 U.S. 186 (1977).

This tenet is best illustrated by the "constitutional principle that all States are admitted to the Union with the same attributes of sovereignty. " *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 203-04 (1999). Every State is "guaranteed upon admission," *United States v. States of Louisiana, Texas, Mississippi, Alabama and Florida*, 363 U.S. 1, 16 (1960), the "'same rights, sovereignty and jurisdiction as the original States possess within their respective borders,'" *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 370 (1977) (quoting *Mumford v. Wardwell*, 73 U.S. (6 Wall.) 423, 436 (1867)). Thus, every State is "upon an equal footing, in all respects whatever." *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 224 (1845).

To be sure, this Court has recognized that "[t]he doctrine of the equality of States" does not prohibit Congress from "remed[ying] ... local evils which have subsequently appeared." *Nw. Austin Mun. Util. Dist. No. One*, 557 U.S. at 203 (quotation marks omitted); *see also id.* ("[A] departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets."). But that is far from the case here. This is not an Act of Congress that deliberately discriminates between the States, as a matter of national policy, to correct a specific problem that has arisen only in certain parts of the country. Quite the opposite. These are regional court decisions that purport to set forth generally applicable principles about state sovereignty, but that consequently create a patchwork of conflicting rules due simply to their limited geographical jurisdiction.

Moreover, concerns about state sovereignty are particularly weighty here, since the state-action antitrust exemption is grounded in federalism principles. As this Court first explained in recognizing the exemption in *Parker v. Brown*: "We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." 317 U.S. 341, 350-51 (1943).

The petition thus must be granted to promptly restore equal sovereignty among the States. As this Court has recently reaffirmed, "'the constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized.'" *Shelby County, Ala. v. Holder*, 133 S. Ct. 2612, 2623 (2013) (quoting *Coyle*, 221 U.S. at 580). Regardless of the merits, so long as the circuits are divided over a question pertaining directly to the scope of state sovereignty, this country suffers a fundamental and immediate harm.

II. STATES WILL SUFFER SOVEREIGN HARM ADAPTING TO AN ERRONEOUS RULE REGARDING STATE GOVERNANCE.

A. The Fourth Circuit's Decision Is Incorrect.

As the Petition explains, the Fourth Circuit's decision is wrong for at least two reasons. *First*, it contravenes three of this Court's antitrust state-action decisions: *Parker*; *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985); and *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365 (1991). Together, those three decisions establish the rule that "an official state entity's enforcement of a clearly articulated anticompetitive state policy is a sovereign act of State government[,] without regard to the public officials' independence from private interests, method of selection, or supervision by other state entities." Pet. 19; *see also id.* at 19-32. By requiring state supervision of an official state entity acting pursuant to a clearly articulated state policy, the Fourth Circuit's decision directly conflicts with this rule.

Indeed, this Court has squarely addressed and rejected the Fourth Circuit's primary concern: that market-participant board members may not exercise sufficiently "independent judgment" from that of their market peers. In *Omni*, the plaintiffs argued that the municipality was not entitled to the state-action exemption because city council members had received benefits from their zoning actions. The Fourth Circuit agreed, finding an exception to the state-action exemption for action "taken pursuant to a conspiracy with private parties." 499 U.S. at 375. This Court reversed, explaining that "it is both inevitable and desirable that public officials often agree to do what one or another group of private citizens urges upon them," *id.*, and refusing to permit a "deconstruction of the governmental process and probing of the official 'intent' " *Id.* at 377.

Second, the Fourth Circuit's rule violates the "principles of federalism and state sovereignty" that the state-action antitrust exemption is intended to protect. *Omni*, 499 U.S. at 370; *see also* Pet. 33-36. As this Court has explained, the exemption is a recognition of "the role of sovereign *States* in a federal system" and "our national commitment to federalism." *Id.* at 370, 374. But by dictating the level and manner of supervision a State must give certain state agencies based on how the state legislature has chosen to structure them, the Fourth Circuit has shown little respect for the States as sovereign entities.

Intrusion on a State's internal government decisions is the height of federal intervention. "Through the structure of its government, and the

character of those who exercise government authority, a State defines itself as a sovereign." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). The Founders intended each State, as a sovereign entity, to retain power over "all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State." The Federalist No. 45, at 289 (J. Madison) (Clinton Rossiter ed., 1999). Thus, this Court has repeatedly held that a State has "vast leeway in the management of its internal affairs." *Sailors v. Bd. of Ed. of Kent Cnty.*, 387 U.S. 105, 109 (1967) (holding that the Constitution permits a state to delegate authority to "subordinate governmental instrumentalities" that are not popularly elected) ; *see also Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 71 (1978) ("[A] State is afforded wide leeway when experimenting with the appropriate allocation of state legislative power."); *Luther v. Borden*, 48 U.S. (7 How.) 1, 47 (1849) ("[A]ccording to the institutions of this country, the sovereignty in every State resides in the people of the State, and they may alter and change their form of government at their own pleasure.").

B. States Will Suffer Harm Adapting to the Fourth Circuit's Erroneous Rule if It Is Not Corrected.

The NC Dental Board is not unique. States often exercise their sovereign powers to create, and clearly delegate authority to, regulatory boards that include "market participant" members. Doctors sit on boards of medicine, dentists sit on dental boards, funeral directors oversee other funeral directors, accountants

lead boards of accountancy, and so on. *See, e.g.*, W Va. Code §§ 30-3-5 (Board of Medicine); 30-4-4 (Board of Dental Examiners); 30-6-4 (Board of Embalmers and Funeral Directors); 30-9-3 (Board of Accountancy).

The ubiquity of the practice of relying on market participants to regulate professional conduct has at least two significant implications. *First*, it suggests a consensus among States and their legislatures that this board composition is the most appropriate and effective way to regulate members of the various professions. Not surprisingly, state legislators have ample reasons to choose to rely on the specialized knowledge of professionals to regulate their own market. *See* Pet. 34. The expertise of professionals ensures that a board can hold market participants to meaningful standards, respond quickly to developments in the profession, and knowledgably address concerns raised by the public.

Second, the Fourth Circuit's decision will have widespread and immediate negative consequences. The court's reasoning should cause the many "state agenc[ies] operated by market participants" outside the Fifth and Ninth Circuits to be concerned about potential FTC action. Pet. App. 15a. All such agencies fall squarely within the Fourth Circuit's rule—no matter how their market-participant members are selected. As the Petition explains, although the Fourth Circuit purports to limit its rule to state boards with market-participant members who are elected by their market peers, nothing in the

decision explains "why the state-law selection method is legally relevant." Pet. 22.[2]

These state agencies (particularly in the Fourth Circuit) now face significant obstacles to carrying out their statutory duties. When confronted with individuals engaging in activities that a state agency deems detrimental to health and safety, the agency must be concerned that the FTC, or some private party, will bring an antitrust action and demand proof of active state supervision. According to the Fourth Circuit, that requirement cannot be met by "[t]he mere presence of some state involvement or monitoring" or "generic oversight." Pet. App. 17a-18a (quotation marks omitted). Instead, the State must itself "establish prices," "review the reasonableness of price schedules," "regulate the terms of fair trade contracts," "monitor market conditions," or "engage in ... pointed reexamination" of its agency's actions. *Id.* at 17a (quotation marks omitted). Even if the agency could

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[2] Even if relevant, the method of market-participant selection would not be much of a limitation. Similar to the NC Dental Board, many market-participant members of these boards are elected or selected to some extent by their peers. *See, e.g.*, W. Va. R. Disciplinary P. 1.3 (appointment of members of the Lawyer Disciplinary Board by the Board of Governors of the West Virginia State Bar at its annual meeting); W. Va. Code §§ 30-16-4 (chiropractor members of the Board of Chiropractic selected by Governor from slate of three nominees "recommended by the West Virginia chiropractic society, incorporated"); 30-19-4 (members of Board of Forestry selected by Governor "from five nominees recommended by the West Virginia Division of the Society of American Foresters"); 30-35-3 (members of Board of Licensed Dieticians selected from list submitted to Governor "by the West Virginia dietetic association").

meet that standard, the State would have to incur the time and expense necessary to satisfy the FTC's fact-intensive inquiry.

Some state agencies may choose to scale back their activities until this Court settles the law. In West Virginia, the decision has already hobbled the State's Board of Dental Examiners to the detriment of West Virginia citizens. Like the NC Dental Board, the West Virginia Dental Board is composed predominantly of licensed dentists. And although those dentists are chosen by the Governor, the statute contemplates the involvement of market participants, specifically the state Dental Association, in the selection process, as they are invited to submit recommendations to the Governor for board vacancies. W. Va. Code § 30-4-4(c). In light of these similarities to the NC Dental Board and out of concern about potential FTC action, the West Virginia Dental Board has declined to take action in response to complaints received concerning the unauthorized practice of dentistry by unlicensed individuals performing teeth-whitening services within the State—the same actions taken by the NC Dental Board and sanctioned by the Fourth Circuit. For a board charged with "the protection of public health and safety," however, *see* W Va. Code § 30-1A-1,hesitancy to act can have very harmful effects.

Other West Virginia boards have expressed concern, too. These numerous state regulatory bodies include the Board of Psychologists. the Massage Therapy Licensure Board, the Board of Osteopathic Medicine, and the Board of Optometry—all of which explicitly support this brief and the NC

Dental Board's petition. Each of these boards is also composed predominantly of market participants, *see* W. Va. Code §§ 30-21-5 (Board of Psychologists); 30-37-3 (Massage Therapy Licensure Board); 30-14-3 (Board of Osteopathic Medicine); 30-8-4 (Board of Optometry), and charged with protecting public health and safety within its area of expertise, *see* W Va. Code §§ 30-21-1 ("the practice of psychology affects the general welfare and public interest of the state and its citizens"); 30-37-1 (requiring massage therapy license "[t]o protect the health, safety and welfare of the public and to ensure standards of competency"); 30-3-1 (finding a need to regulate the practice of medicine "to protect the public interest"); 30-1A-1 ("The Legislature finds that regulation should be imposed on an occupation or profession only when necessary for the protection of public health and safety.").

Worse still, state legislatures will likely take steps to reconfigure their regulatory boards, even though there are already ample restraints in place. In addition to the federal-law requirement that boards act pursuant to "clearly articulated" policy, numerous existing state-law "checks" ensure that regulatory boards and agencies act within the law and in accordance with the will of the State. These include: gubernatorial oversight for unbecoming conduct, *see, e.g.*, W. Va. Code §§ 3-3-5 (allowing Governor to remove members of the Board of Medicine for "official misconduct, incompetence, neglect of duty or gross immorality"), 30-10-4 (allows removal of veterinary board members for "neglect of duty, incompetency or official misconduct"); state ethics commission rules, *see* W. Va. Code §§ 6B-1-1 *et*

seq.; required annual reports to the legislature, *see* W. Va. Code § 30-1-12(b); budget control, *see* W Va. Const. Art. 6 § 51; legislative approval of rules, *see* W. Va. Code §§ 29A-3-1 *et seq.*; open meetings requirements, *see* W. Va. Code §§ 6-9A-1 *et seq.*; state public records laws, *see* W. Va. Code § 30-1-12(a); state administrative procedures, *see* W. Va. Code §§ 29A-1-1 *et seq.*; and judicial review through declaratory judgment actions, *see* W. Va. Code §§ 55-13-1 *et seq.*

Now, the Fourth Circuit's rule will cause unnecessary and detrimental changes. Some States may choose to add more layers of regulatory oversight, even though it will cost money, time, and efficiency, and they can only hope that the additional measures will satisfy a court later reviewing for sufficiently "active supervision." Other States may choose instead to stop relying on market participants and lose the benefits of their professional expertise. In any event, the States and their citizens are the ones who suffer.

Finally, the very act of reconfiguring its regulatory apparatus is itself harmful to a State. One incalculable but very real cost is the legislature's time—time that could be directed toward other measures to serve the people of the State. Another is the harm to state sovereignty that results from a State being forced by fear of federal regulatory consequences to change its system of self-governance.

The petition must be granted to prevent these unnecessary harms. If the Court agrees to review this case, it is likely that few state legislatures will

make permanent changes to their regulatory boards. But the longer this Court waits to resolve this issue, the more likely it is that States will take broad steps that will be difficult to reverse.

III. THIS CASE IS AN IDEAL VEHICLE.

This case presents an ideal vehicle to determine whether the "active supervision" requirement of *Midcal* applies to a state board simply because some or all of its members are also market participants. That is the only issue before the Court. There is no question at this time as to whether the NC Dental Board acted pursuant to and within "clearly articulated" state policy. The FTC assumed that the board had satisfied that requirement, *see* Pet. App. 47a, and the Fourth Circuit did not need to reach that issue. If this Court rules in favor of the NC Dental Board, this case could properly return to the FTC for an adjudication of that issue. *See, e.g., Federal Comm. Comm'n v. Fox Television Stations, Inc.*, 556 U.S. 502, 529 (2009) (upholding challenged orders on administrative law grounds and remanding for consideration of constitutional issues that had not been decided by the lower court). Nor is there any question before this Court as to whether the "active supervision" requirement has been met, if it does indeed apply. The NC Dental Board has not challenged that fact-intensive determination or any of the remaining substantive antitrust issues addressed in the Fourth Circuit's decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

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JOINT APPENDIX

No. 13-534

In the Supreme Court of the United States

THE NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

JOINT APPENDIX

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In the Matter of The North Carolina Board of Dental Examiners

* * *

FTC MATTER/FILE NUMBER: 081 0137
DOCKET NUMBER: 9343
ENFORCEMENT TYPE: Part III Administrative Complaint

* * *

CASE TIMELINE

* * *

December 7, 2011
-Opinion of the Commission, By Commissioner J. Thomas Rosch For A Unanimous Commission

* * *

October 14, 2011
-Respondents Reply Brief

* * *

October 4, 2011
-Complaint Counsel's Answering Brief to Respondent's Appeal Brief

* * *

August 25, 2011
-Respondents Appeal Brief

* * *

July 28, 2011
-Respondents Notice of Appeal

* * *

July 19, 2011
-Initial Decision by Chief Administrative Law Judge D. Michael Chappell, Filed On July 14, 2011

* * *

May 5, 2011
-Respondents Proposed Findings of Fact, Conclusions of Law, and Order, As Amended

-Complaint Counsel's Reply to Respondent's Post-Trial Brief

-Complaint Counsel's Reply to Respondent's Post-Trial Proposed Findings of Fact and Conclusions of Law

-Respondent's Reply to Complaint Counsel's Post-Trial Brief

-Respondent's Replies to Complaint Counsel's Proposed Findings of Fact

* * *

April 25, 2011

* * *

-Complaint Counsel's Post-Trial Brief and Proposed Order

-Complaint Counsel's Post-Trial Proposed Findings of Fact and Conclusions of Law

-Respondent's Post-Trial Brief

* * *

February 8, 2011

-Opinion of the Commission

-Order Denying Respondent's Motion to Dismiss, Granting Complaint Counsel's Motion for Partial Summary Decision, Denying Respondent's Motion to Disqualify the Commission, and Granting Respondent's Motion for Leave to File Limited Surreply Brief

* * *

December 28, 2010

-Complaint Counsel's Memorandum in Reply to Respondent's Corrected Memorandum in Opposition to Complaint Counsel's Motion for Partial Summary Decision

December 22, 2010
-Response by Counsel for Respondent to Complaint Counsel's Supplemental Filing in Reply to Respondent's Corrected Memorandum in Opposition to Complaint Counsel's Motion for Partial Summary Decision

December 21, 2010
-Complaint Counsel's Supplemental Filing in Reply to Respondent's Corrected Memorandum in Opposition to Complaint Counsel's Motion for Partial Summary Decision

December 20, 2010
-Respondent's Reply Memorandum in Support of Motion to Dismiss

* * *

December 13, 2010
-Respondent's Memorandum in Opposition to Complaint Counsel's Motion for Partial Summary Decision

* * *

November 30, 2010
-Complaint Counsel's Memorandum in Opposition to Respondent's Motion to Dismiss

* * *

November 8, 2010
-Complaint Counsel's Motion for Partial Summary Decision, Memorandum of Law in Support, and Separate Statement of Material Facts as to Which There is No Genuine Issue

November 5, 2010
-Respondent's Memorandum in Support of Motion to Dismiss (Corrected)

* * *

November 3, 2010

* * *

-Respondent's Motion to Dismiss

* * *

July 7, 2010

* * *

-Response to Complaint

* * *

June 17, 2010
-Administrative Complaint

* * *

General Docket
United States Court of Appeals for the Fourth Circuit

Court of Appeals Docket #: 12-1172	**Docketed:** 02/13/2012
The North Carolina State Board v. FTC	**Termed:** 05/31/2013
Appeal From: Federal Trade Commission	
Fee Status: fee paid	

Case Type Information:
1) Agency Review
2) Petition for Review
3) null

Originating Court Information:
District: FTC-1 No. 9343
Date Decided: 12/02/2011 Date Rec'd COA: 02/10/2011

Prior Cases:
None

Current Cases:

	Lead	Member	Start	End
Seriatim	12-1172	11-1679	02/28/2012	

* * *

02/10/2012	2	Petition for review of agency order (FRAP 15) filed by the North Carolina State Board of Dental Examiners [998787153][12-1172](BB)

* * *

02/13/2012	1	Case docketed. Originating case number: Docket No. 9343. Case manager: Brian Bain. Date notice of appeal filed: [12-

1172](BB)

* * *

07/06/2012	63	FULL ELECTRONIC APPENDIX and full paper appendix by Petitioner The North Carolina State Board of Dental Examiners. Method of Filing Paper Copies: courier. Date paper copies mailed, dispatched or delivered to court: 07/06/2012. Has district court 90-day restriction expired for all transcripts included in appendix? Not applicable [998889841][12-1172] Noel Allen

* * *

07/06/2012	65	SEALED APPENDIX VOLUME(S) by Petitioner The North Carolina State Board of Dental Examiners in electronic and paper format. Method of Filing Paper Copies: courier. Date Copies Mailed, Dispatched, or Delivered to court: 07/06/2012. Filed Ex parte: N. [12-1172] Noel Allen

* * *

07/18/2012	73	BRIEF by Respondent FTC in electronic and paper format. Type of Brief: Response. Method of Filing Paper Copies: mail. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 07/18/2012. [998898019][12-1172] Imad Abyad

* * *

07/19/2012	74	BRIEF by Petitioner The North Carolina State Board of Dental Examiners in electronic and paper format. Type of Brief: Opening. Method of Filing Paper Copes: courier. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 07/19/2012. [998898535][12-1172] Noel Allen

* * *

07/19/2012	76	Supplemental FULL ELECTRONIC APPENDIX and full paper appendix by Respondent FTC. Method of Filing Paper Copies: mail. Date paper copies mailed dispatched or delivered to court: 07/18/2012. Has district court 90-day restriction expired for all transcripts included in appendix? Not applicable [998898917][12-1172] Imad Abyad
07/19/2012	77	BRIEF by Petitioner The North Carolina State Board of Dental Examiners in electronic and paper format. Type of Brief: Reply. Method of Filing Paper Copies: courier. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 07/19/2012. [998898935][12-1172] Noel Allen

* * *

12/05/2012	87	ORAL ARGUMENT heard before the Honorable Dennis W. Shedd,

		Barbara Milano Keenan and James A. Wynn, Jr., Attorneys arguing case: Mr. Noel Lee Allen for Petitioner The North Carolina State Board of Dental Examiners and Mr. Imad Dean Abyad for Respondent FTC. Courtroom Deputy: Richard Sewell. [996996109][12-1172](RHS)
		* * *
05/31/2013	94	PUBLISHED AUTHORED OPINION filed. Originating case number: No. 9343. [999119424]. [12-1172] Annotation added to opinion reflecting Supreme Court history.—[Edited 04/01/2014 by AW](CB)
05/31/2013	95	JUDGMENT ORDER filed. Disposition method: 12-1178 opn.p.arg. Decision: Petition denied. Originating case number: No. 9343. Entered on Docket Date: 05/31/2013. [999119435] Copies to all parties and the district court/agency. [12-1172] (CB)
		* * *
07/15/2013	103	PETITION for rehearing and rehearing en banc by Petitioner The North Carolina State Board of Dental Examiners. [12-1172] Matthew Sawchak
		* * *
07/30/2013	119	COURT ORDER filed [999161782] denying Motion for

		rehearing and rehearing en banc [103]. Copies to all parties. [12-1172](CB)
08/05/2013	120	MOTION by Petitioner The North Carolina State Board of Dental Examiners to stay mandate [FRAP 41(d)]. Date and method of service: 08/05/2012 US Mail, ecf. [999165632][12-1172] Matthew Sawchak
		* * *
08/28/2013	122	COURT ORDER filed [999182443] denying Motion to stay mandate [FRAP 41(d)][120] Copies to all parties. Mailed to: Richard M. Brunell, Peter Carstensen, Stephen W. Keene, Leonard A. Nelson, Dale E. Thomas, Willard K. Tom, K. Craig Wildfang. [12-1172] (DSD)
09/05/2013	123	Mandate issued. Referencing [95] Judgment Order, [94] Published Authored Opinion. Originating case number: No. 9343. [12-1172](CB)
		* * *

NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS

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BOBBY D. WHITE, Chief Operations Officer

March 21, 2007

CERTIFIED MAIL/RETURN RECEIPT

Ms. Nicole Haynes
Nicole's Hair Salon
102 Wilkesboro Avenue
North Wilkesboro, North Carolina 28659

NOTICE AND ORDER TO CEASE AND DESIST

Dear Ms. Haynes:

The North Carolina State Board of Dental Examiners is investigating a report that you are engaged in the unlicensed practice of dentistry. Practicing dentistry without a license in North Carolina is a crime. See (NC General Statutes § 90-40 and §90-40.1).

You are hereby ordered to CEASE AND DESIST any and all activity constituting the practice of dentistry or dental hygiene as defined by North Carolina General Statutes §90-29 and §90-233 and the Dental Board Rules promulgated thereunder.

Specifically, G.S. 90-29(b) states that ...."A person shall be deemed to be practicing dentistry in this State who does, undertakes or attempts to do, or claims the ability to do any one or more of the following acts or things which, for the purposes of this Article, constitute the practice of dentistry:"

"(2) Removes stains, accretions or deposits from the human teeth;"

"(7) Takes or makes an impression of the human teeth, gums or jaws;"

"(10) Performs or engages in any of the clinical practices included in the curricula of recognized dental schools or colleges."

EXECUTIVE OFFICE • 507 AIRPORT BOULEVARD, SUITE 105 • MORRISVILLE, NORTH CAROLINA 27560-8200
TELEPHONE (919) 678-8223 • FAX (919) 678-8472 • EMAIL: [illegible] • www.[illegible]

Ms. Nicole Haynes
March 21, 2007
Page Two

The North Carolina State Board of Dental Examiners is the state agency charged with regulating the practice of dentistry in North Carolina and is the proper agency to conduct this investigation. The Board may use any legal means at its disposal to conduct this investigation including, but not limited to, interviews with current and former patients, surveillance, and the hiring of undercover agents.

The Board requests that you cooperate in the current investigation by calling the Board's office and arranging to be interviewed by the Board's investigator and by submitting a written response to this notice and order within fifteen (15) days of the receipt of this letter.

Sincerely,

Terry W. Friddle
Deputy Operations Officer

THE NORTH CAROLINA STATE
BOARD OF DENTAL EXAMINERS

cc: Case Officer
Ms. Carolin Bakewell, Board Attorney

NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS

W. STAN HARDESTY, D.D.S., President
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C. WAYNE HOLLAND, D.D.S.
BRAD C. MORGAN, D.D.S.
NEPLUS S. HALL, R.D.H.

BOBBY D. WHITE, Chief Operations Officer

Dec. 4, 2007

White Science
45 West Crossville Road, Ste. 514
Roswell, Ga. 30075

NOTICE TO CEASE AND DESIST

Greetings:

The N.C. State Board of Dental Examiners learned that your firm is offering teeth whitening services to members of the public in this State at various shopping malls.

As the Board advised you in its Feb. 13, 2007 letter, any process that "[r]emoves stains, accretions or deposits from human teeth" constitutes the practice of dentistry. See North Carolina General Statute Section 90-29(a)(2). Our information indicates that your employees are assisting clients to accelerate the whitening process with an LED light, which constitutes the unauthorized practice of dentistry. This is a misdemeanor. See North Carolina General Statute Section 90-40.

The Board hereby directs your company to cease its activities unless they are performed or supervised by a properly licensed North Carolina dentist. If the Board determines that you or your employees continue offering whitening services to the public after receiving this Notice, it will have no choice but to seek relief in the courts of this State.

Thank you for your cooperation.

Very truly yours,

Carolin Bakewell

Carolin Bakewell
Counsel

507 AIRPORT BOULEVARD, SUITE 105 • MORRISVILLE, NORTH CAROLINA 27560-8228
TELEPHONE (919) 678-8233 • FAX (919) 678-8472 • EMAIL: [redacted] • [redacted]

NORTH CAROLINA STATE BOARD
OF DENTAL EXAMINERS

[* * *] [* * *]

[* * *]

January 11, 2006

Serenity Day Spa
814 C Old Spartanburg Highway
Hendersonville, North Carolina 28792

To Whom It May Concern:

It has come to the attention of the North Carolina State Board of Dental Examiners that you may be taking dental impressions to fabricate bleaching trays for "professional teeth whitening," which would attest that you are engaged in the unlicensed practice of dentistry. Practicing dentistry without a license in North Carolina is a crime (NC General Statutes § 90-40 and §90-40.1) punishable by criminal and civil penalties. You are hereby ordered to CEASE AND DESIST any and all activity constituting the practice of dentistry or dental hygiene as defined by North Carolina General Statutes §90-29 and §90-233 and the Dental Board Rules promulgated thereunder.

The North Carolina State Board of Dental Examiners is the state agency charged with regulating the practice of dentistry in North Carolina and is the proper agency to inform you of your responsibility to comply with this letter.

If you have any questions or concerns regarding this matter, please feel free to contact us at (919) 678-8223. Thank you for your cooperation.

Sincerely,

Terry W. Friddle
Deputy Operations Officer

[* * *]

NORTH CAROLINA STATE BOARD
OF DENTAL EXAMINERS

[* * *] [* * *]

[* * *]

May 13, 2006

HAND DELIVERED

Ms. Stephanie R. Keith
Star-Bright Whitening Systems, Inc
408 Hawkins Avenue
Sanford, North Carolina 27330

Dear Ms. Keith:

This will serve to notify you that the North Carolina State Board of Dental Examiners is investigating a report that you are engaged in the unlicensed practice of dentistry. Practicing dentistry without a license in North Carolina is a crime (NC General Statutes § 90-40 and §90-40.1) punishable by criminal and civil penalties. You are hereby ordered to CEASE AND DESIST any and all activity constituting the practice of dentistry or dental hygiene as defined by North Carolina General Statutes §90-29 and §90-233 and the Dental Board Rules promulgated thereunder. Specifically, G.S. 90-29(b) states that .... "A person shall be deemed to be practicing dentistry in this State who does, undertakes or attempts to do, or claims the ability to do any one or more of the following acts or things

which, for the purposes of this Article, constitute the practice of dentistry:"

"(7) Takes or makes an impression of the human teeth, gums or jaws."

The North Carolina State Board of Dental Examiners is the state agency charged with regulating the practice of dentistry in North Carolina and is the proper agency to conduct this investigation. The Board may use any legal means at its disposal to conduct this investigation including, but not limited to, interviews with current and former patients, surveillance, and the hiring of undercover agents to pose as patients. The Board requests that you cooperate in the current investigation by calling the Board's office and arranging to be interviewed by the Board's investigator.

Sincerely,

/s/ Terry W. Friddle
Terry W Friddle
Deputy Operations Officer
THE NORTH CAROLINA
STATE BOARD OF
DENTAL EXAMINERS

cc: Case Officer
Board Attorney

[* * *]

NORTH CAROLINA STATE BOARD
OF DENTAL EXAMINERS

[* * *] [* * *]

[* * *]

July 3, 2007

Ms. Patrice Barragan
Sunsational Tan, Inc.
1537 North Road Street
Ste. A
Elizabeth City NC 27909-3472

CEASE AND DESIST NOTICE

Dear Ms. Barragan:

It has come to the attention of the N.C. State Board of Dental Examiners that your business is offering teeth whitening services to members of the public.

Please be advised that any process that "[r]emoves stains, accretions or deposits from human teeth" constitutes the practice of dentistry. *See* North Carolina General Statute Section 90-29(a)(2). If you or your employees are assisting clients to apply whitening gel and/or accelerate the process with a UV light, you may be engaging in the unauthorized practice of dentistry, which is a misdemeanor. *See* North Carolina General Statute Section 90-40.

The Board requests your company to cease its activities unless they are performed or supervised by a properly licensed North Carolina dentist.

Thank you for your cooperation.

Very truly yours,

/s/ Carolin Bakewell

Carolin Bakewell
Counsel

[* * *]

NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS

[* * *] [* * *]

[* * *]

Nov. 21, 2007

Ms. Christiane Dotson
Ms. Sherry Nelson
Ms. Heather York
Celebrity Smiles
c/o The Streets at Southpoint
6910 Fayetteville Road
Durham, NC 27713

NOTICE AND ORDER TO CEASE AND DESIST
BY HAND DELIVERY

GREETINGS:

The North Carolina State Board of Dental Examiners is investigating a report that you are engaged in the unlicensed practice of dentistry, which is a misdemeanor in this state pursuant to N.C. Gen. Stat. § 90-40.

You are hereby ORDERED to CEASE AND DESIST all activity constituting the practice of dentistry as defined by N.C. Gen. Stat. 90-29, which states, in pertinent part that

"[a] person shall be deemed to be practicing dentistry in this State who does, undertakes or attempts to do, or claims the ability to do any one or more of the following acts or things, which, for the

purposes of this Article, constitute the practice of dentistry:

(2) Removes stains, accretions or deposits from the human teeth."

The North Carolina State Board of Dentistry is the state agency charged with regulating the practice of dentistry in North Carolina and is the proper agency to conduct this investigation.

You are hereby requested to cooperate with the investigation by calling the Board's office and arranging to be interviewed by one of the Board's investigators and by submitting a written response to this Notice and Order within 15 days of receipt.

Sincerely,

/s/ Terry W. Friddle

Terry W. Friddle

Deputy Operations Officer

THE NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS

[* * *]

NORTH CAROLINA STATE BOARD
OF DENTAL EXAMINERS

[* * *] [* * *]

[* * *]

January 23, 2008

Dr. Kyle W. Taylor
2315 West Arbors Drive
Ste. 105
Charlotte, NC 28262

Re: Tooth Whitening Kiosks

Dear Dr. Taylor:

You will find enclosed a copy of a letter that the Dental Board has written to the management of Carolina Place Mall regarding the improper whitening of teeth by non-dentists. Staff wrote to the Chicago company that owns Carolina Place Mall about the subject in November 2007.

Please let us know if the practice continues and if we may be of additional service. Thank you for drawing this matter to our attention.

Very truly yours,

/s/ Carolin Bakewell

Carolin Bakewell
Board Counsel

[* * *]

NORTH CAROLINA STATE BOARD
OF DENTAL EXAMINERS

[* * *] [* * *]

[* * *]

Nov. 21, 2007

General Growth Properties
110 N. Wacker Drive
Chicago, IL 60606

Re: Tooth Whitening Kiosks

Dear Sir or Madam:

The N.C. State Board of Dental Examiners is the agency created by the North Carolina legislature to enforce the dental laws in this state. The Dental Board has learned that an out of state company has leased kiosks in a number of shopping malls in North Carolina for the purpose of offering tooth whitening services to the public.

North Carolina law specifically provides that the removal of stains from human teeth constitutes the practice of dentistry. See N.C. Gen. Stat. 90-29(b)(2), a copy of which is enclosed. The unauthorized practice of dentistry is a misdemeanor. See N.C. Gen. Stat. 90-40, a copy of which is also enclosed.

It is our information that the teeth whitening services offered at these kiosks are not supervised by a licensed North Carolina dentist. Consequently, this activity is illegal.

The Dental Board would be most grateful if your company would assist us in ensuring that property

owned or managed by your company is not being used for improper activity that could create a risk to the public health and safety.

Please feel free to contact me if you have questions.

Very truly yours,

/s/Carolin Bakewell

Carolin Bakewell
Board Counsel

Enclosures

[* * *]

NORTH CAROLINA STATE BOARD
OF DENTAL EXAMINERS

[* * *] [* * *]

[* * *]

March 26, 2009

Bleach Bright
Jason & Shanon Rabon CONFIDENTIAL
807 Williamson Road #101
Mooresville, North Carolina 28117

NOTICE AND ORDER TO CEASE AND DESIST

To Whom It May Concern:

The North Carolina State Board of Dental Examiners is investigating a report that you are engaged in the unlicensed practice of dentistry. Practicing dentistry without a license in North Carolina is a crime. See (NC General Statues § 90-40 and §90-40.1).

You are hereby ordered to CEASE AND DESIST any and all activity constituting the practice of dentistry or dental hygiene as defined by North Carolina General Statutes §90-29 and §90-233 and the Dental Board Rules promulgated thereunder.

Specifically, G.S. 90-29(b) states that .... "A person shall be deemed to be practicing dentistry in this State who does, undertakes or attempts to do, or claims the ability to do any one or more of the

following acts or things which, for the purposes of this Article, constitute the practice of dentistry."

"(2) Removes stains, accretions or deposits from the human teeth;"

"(7) Takes or makes an impression of the human teeth, gums or jaws;"

"(10) Performs or engages in any of the clinical practices included in the curricula of recognized dental schools or colleges."

The North Carolina State Board of Dental Examiners is the state agency charged with regulating the practice of dentistry in North Carolina and is the proper agency to conduct this investigation. The Board may use any legal means at its disposal to conduct this investigation including, but not limited to, interviews with current and former patients, surveillance, and the hiring of undercover agents.

The Board requests that you cooperate in the current investigation by submitting a written response to this notice and order within fifteen (15) days of the receipt of this letter.

Sincerely,

Casie S. Goode

Assistant Director of Investigations

THE NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS

cc: Case Officer
Ms. Carolin Bakewell, Board Attorney

[* * *]

NORTH CAROLINA STATE BOARD
OF DENTAL EXAMINERS

[* * *] [* * *]

[* * *]

September 22, 2009

CERTIFIED MAIL/RETURN RECEIPT

Serenity Total Body Care
Bleach Bright
108-A Clay Street
Mebane, North Carolina 27032

NOTICE OF APPARENT VIOLATION AND
DEMAND TO CEASE AND DESIST

To Whom It May Concern:

The North Carolina State Board of Dental Examiners is investigating a report that you are engaged in the unlicensed practice of dentistry. Pursuant to N.C. General Statute § 90-41, practicing dentistry without a license in North Carolina is a misdemeanor.

The Dental Board hereby demands that you CEASE AND DESIST any and all activity constituting the practice of dentistry as defined by North Carolina General Statutes § 90-29 and the Dental Board Rules promulgated thereunder.

Specifically, G.S. § 90-29(b) states that "...[a] person shall be deemed to be practicing dentistry in this State who does, undertakes or attempts to do, or claims the ability to do any one or more of the

following acts or things which, for the purposes of this Article, constitute the practice of dentistry:

(2) Removes stains, accretions or deposits from the human teeth;

(7) Takes or makes an impression of the human teeth, gums or jaws;

(10) Performs or engages in any of the clinical practices included in the curricula of recognized dental schools or colleges.

(11) Owns, manages, supervises, controls or conducts, either himself or by and through another person or persons, any enterprise wherein any one or more of the acts or practices set forth in [G.S. 90-29(b)(1) – (10)].

(13) Represents to the public, by any advertisement or announcement, by or through any media, the ability or qualification to do or perform any of the acts or practices set forth in [G.S. 90-29(b)(1) – (10)].

The North Carolina State Board of Dental Examiners is the state agency charged with regulating the practice of dentistry in North Carolina and is the proper agency to conduct this investigation. The Board may use any legal means at its disposal to conduct this investigation including, but not limited to, interviews with current and former patients, surveillance, and the hiring of undercover agents.

The Board requests that you cooperate in the current investigation by submitting a written response to this notice within fifteen (15) days of the receipt of this letter.

Sincerely,

/s/Cassie S. Goode

Cassie S. Goode
Assistant Director of
Investigations

THE NORTH CAROLINA
STATE BOARD OF
DENTAL EXAMINERS

cc: Case Officer
Ms Carolin Bakewell, Board Attorney

[* * *]

FEDERAL TRADE COMMISSION

NON-PUBLIC INVESTIGATIONAL HEARING

RE: NORTH CAROLINA DENTAL BOARD OF EXAMINERS

File No. 081-0137

WITNESS: TERRY W. FRIDDLE

Tuesday, July 7, 2009

9:00 a.m.

Raleigh, North Carolina

Reported by: Jane Worthen Eaton, RMR, CRR, CMRS

* * *

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Q. I think I'd like to talk about the investigation process itself, just if you could walk me through the process chronologically.

So a complaint has come in the door. Case has been assigned to case officer, the investigator and the case manager. Tell me about the process from that point on. And this is with respect to teeth whitening, on teeth whitening complaint. So what's the first step that gets done?

A. The others are much easier. Well, with teeth whitening it is different from the normal complaint, and

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I think I need to give you some background in order to really explain that process.

When we initially started getting teeth whitening complaints, as I mentioned earlier, there were very few of them. And so the Board's procedure at that time was to—we would send somebody out either undercover or one of the investigators out to see what was going on. I actually did a couple of undercover procedures myself. We would go in, pretend to be a client or customer, and see what was actually occurring in the salons or the tanning beds or wherever there were. If we found that they were doing the practice of dentistry, then a cease and desist letter to be sent out.

Over the course of the years when they started to pick up and we got quite a number at one time, in '07 and '08 we just were not able—we didn't have the manpower or the time to send somebody undercover to each one of these places. And so depending on the information that we had at hand, we would generally just send a cease and desist letter and then have them explain to us the reason why they weren't practicing dentistry.

Q. And so is that still the model you have today is if a complaint comes in, gets assigned, then generally

you'll send out a cease and desist and wait for a response to come in?

A. If it is unclear as to whether or not, or if it appears that there's a violation, then we would send a cease and desist, you know. And I'll be honest, sometimes they've written back and they've said we're not doing dentistry. Or they've written back and said, I'm going to, I'll stop immediately. And when we get that, we'll close the file. If they've agreed to stop, they've sold their equipment, you

know, gotten out of it. If they claim that they are not doing teeth whitening or the practice of dentistry, then, you know, need to look a little harder and see what they are doing. But we just didn't have the manpower to go out and do undercover investigations on every one that we had gotten.

* * *

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Q. So, who makes all the decisions on how the team should proceed? Once the file is set up, who makes the decisions on whether a cease and desist letter should go out or whether a site visit should take place?

A. The case officer.

Q. So that staff that's assigned to a particular case checks in with the case officer, asks them, how do you want to proceed?

A. Right. Generally when we—I mean, the complaint comes in and it gets assigned to a case officer. I will forward him a copy of the complaint and say, how do you want us to proceed?

Q. What is the purpose of the cease and desist letter that's sent out by the Board?

A. That they will cease and desist from practicing dentistry.

Q. And is a cease and desist sent out on each teeth whitening complaint that the Board receives?

A. No.

Q. Because? What's the distinction?

A. Well, every case is handled—it is on a case-by-case basis. We look at the facts and we look at the evidence that we have. If we feel like we need to

go out. And, I mean, there have been some cases where we just didn't have enough to know what was going on, and so in those cases we would send our investigator out or we would send somebody out undercover to see what was going on. And if it came back that we felt the practice of dentistry was occurring, then we'd send a cease and desist. If we had information in the materials that were sent to us that it may specifically say what we're making impressions or, you know, we have custom trays, or, you know, whatever, that would give us information that lead us to believe that there is a violation there, then we would just go ahead and send a cease and desist.

Q. In what percentage of cases does the Board not send out a cease and desist letter?

A. What percentage? Well, early.

MR. ALLEN: Yeah.

MS. DiMOSCATO: And this is assuming that the Board has agreed to take the case, case has been assigned, file has been opened and you're at that point where the investigative process is about to start.

MR. ALLEN: Are you looking over the course of all history or a time frame or today?

MS. DiMOSCATO: Let's talk about in 2008, for instance.

THE WITNESS: In 2008 we probably sent the

majority of our cease and desist letters. 2007, 2008. So I would say the percentage of cases that didn't get a cease and desist was probably pretty low.

BY MS. DiMOSCATO:

Q. How soon after the complaint is received and the file is set up does a cease and desist letter go out?

A. In 2007, 2008 it was fairly quickly, like shortly after the case was set up.

* * *

Statutory Provisions Governing Membership Composition of and Selection Criteria For North Carolina Occupational Licensing and Regulatory Boards

1. Acupuncture Licensing Board
2. Agency for Public Telecommunications
3. Alarm Systems Licensing Board
4. Appraisal Board
5. Auctioneers Commission
6. Board for Licensing of Geologists
7. Board for Licensing of Soil Scientists
8. Board of Architecture
9. Board of Athletic Trainer Examiners
10. Board of Certified Public Accountant Examiners
11. Board of Cosmetic Art Examiners
12. Board of Dietetics/Nutrition
13. Board of Electrolysis Examiners
14. Board of Examiners for Speech and Language Pathologists and Audiologists
15. Board of Examiners in Optometry
16. Board of Funeral Service
17. Board of Landscape Architects
18. Board of Law Examiners
19. Board of Licensed Professional Counselors
20. Board of Massage and Bodywork Therapy
21. Board of Nursing
22. Board of Occupational Therapy
23. Board of Pharmacy

24. Board of Physical Therapy Examiners
25. Board of Podiatry Examiners
26. Code Officials Qualification Board
27. Home Inspector Licensure Board
28. Interpreter and Transliterator Licensing Board
29. Irrigation Contractors' Licensing Board
30. Landscape Contractors' Registration Board
31. Locksmith Licensing Board
32. Marriage and Family Therapy Licensure Board
33. Medical Board
34. On-Site Wastewater Contractors and Inspectors Certification Board
35. Private Protective Services Board
36. Psychology Board
37. Recreational Therapy Licensure Board
38. Real Estate Commission
39. Respiratory Care Board
40. Small Business Contractor Authority
41. Social Work Certification and Licensure Board
42. State Bar Council
43. State Board of Barber Examiners
44. State Board of Chiropractic Examiners
45. State Board of Dental Examiners
46. State Board of Environmental Health Specialist Examiners
47. State Board of Examiners for Engineers and Surveyors

48. State Board of Examiners of Electrical Contractors
49. State Board of Examiners of Fee-Based Practicing Pastoral Counselors
50. State Board of Examiners of Plumbing, Heating, and Fire Sprinkler
51. State Board of Opticians
52. State Board of Refrigeration Examiners
53. State Board of Registration for Foresters
54. State Hearing Aid Dealers and Fitters Board
55. State Licensing Board for General Contractors
56. Substance Abuse Professional Practice Board
57. Veterinary Medical Board

1. Acupuncture Licensing Board

§ 90-453. Acupuncture Licensing Board.

(a) Membership.—The Acupuncture Licensing Board shall consist of nine members, three appointed by the Governor and six by the General Assembly. The six members appointed by the General Assembly shall be licensed to practice acupuncture in this State and shall not be licensed physicians under Article 1 of this Chapter. The persons initially appointed to those positions by the General Assembly need not be licensed at the time of selection but shall have met the qualifications under G.S. 90 455(a)(4) and (5). Of the Governor's three appointments, one shall be a layperson who is not employed in a health care profession; one shall be a physician licensed under Article 1 of this Chapter who has successfully completed 200 hours of Category I American Medical Association credit in medical acupuncture training as recommended by the American Academy of Medical Acupuncture; and one shall be licensed to practice acupuncture in this State. Of the members to be appointed by the General Assembly, three shall be appointed upon the recommendation of the Speaker of the House of Representatives, and three shall be appointed upon the recommendation of the President Pro Tempore of the Senate. The members appointed by the General Assembly must be appointed in accordance with G.S. 120-121.

Members serve at the pleasure of the appointing authority. Vacancies shall be filled by the original appointing authority and the term shall be for the balance of the unexpired term. A vacancy by a member appointed by the General Assembly must be filled in accordance with G.S. 120-122.

2. Agency for Public Telecommunications

§ 143B-426.9. North Carolina Agency for Public Telecommunications— Creation; membership; appointments, terms and vacancies; officers; meetings and quorum; compensation.

The North Carolina Agency for Public Telecommunications is created. It is governed by the Board of Public Telecommunications Commissioners, composed of 27 members as follows:

(1) A Chairman appointed by, and serving at the pleasure of, the Governor;

(2) Ten at large members, appointed by the Governor from the general public;

(3) Two members appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives in accordance with G.S. 120-121;

(4) Two members appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate in accordance with G.S. 120-121;

(5) The Secretary of Administration, ex officio;

(6) The Chairman of the Board of Trustees of The University of North Carolina Center for Public Television (if and when established), ex officio;

(7) The Chairman of the State Board of Education, ex officio;

(8) The Chairman of the OPEN/net Committee, ex officio, so long as such person is not a State employee;

(9) The Chairman of the North Carolina Utilities Commission, ex officio;

(10) The Director of the Public Staff of the North Carolina Utilities Commission, ex officio;

(11) The Chairman of the Public Radio Advisory Committee of the North Carolina Agency for Public Telecommunications, ex officio;

(12) The Superintendent of Public Instruction, ex officio;

(13) The President of the University of North Carolina, ex officio;

(14) The President of the Community Colleges System, ex officio; and

(15) Two members ex officio who shall rotate from among the remaining heads of departments enumerated in G.S. 143A-11 or G.S. 143B-6, appointed by the Governor.

3. Alarm Systems Licensing Board

§ 74D-4. Alarm Systems Licensing Board.

(b) The Board shall consist of seven members: the Attorney General or his designee; two persons appointed by the Governor, one of whom shall be licensed under this Chapter and one of whom shall be a public member; two persons appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate in accordance with G.S. 120-121, one of whom shall be licensed under this Chapter and one of whom shall be a public member; and two persons appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives in accordance with G.S. 120-121, one of whom shall be licensed under this Chapter and one of whom shall be a public member.

4. Appraisal Board

§ 93E-1-5. Appraisal Board.

(a) There is created the North Carolina Appraisal Board for the purposes set forth in this Chapter. The Board shall consist of nine members. The Governor shall appoint five members of the Board, and the General Assembly shall appoint four members in accordance with G.S. 120-121, two upon the recommendation of the President Pro Tempore of the Senate and two upon the recommendation of the Speaker of the House of Representatives. Members appointed by the Governor shall be appointed from geographically diverse areas of the State. The appointees recommended by the Speaker of the House of Representatives and four of the appointees of the Governor shall be persons who have been engaged in the business of real estate appraising in this State for at least five years immediately preceding their appointment and are also State licensed or State certified real estate appraisers. One of the appointees of the Governor shall be a person representing either the real estate appraisal management industry or the banking industry. No more than three of the appointees may be members of the same appraiser trade organization at any one time. The appointees recommended by the President Pro Tempore of the Senate shall be a person not involved directly or indirectly in the real estate, real estate appraisal, or the real estate lending industry. Members of the Board shall serve three year terms, so staggered that the terms of three members expire in one year, the terms of three members expire in the next year, and the terms of three members expire in the third year of each three year period. The

members of the Board shall elect one of their members to serve as chairman of the Board for a term of one year. The Governor may remove any member of the Board appointed by the Governor for misconduct, incompetency, or neglect of duty. The General Assembly may remove any member appointed by it for the same reasons. Successors shall be appointed by the appointing authority making the original appointment. All vacancies occurring on the Board shall be filled, for the unexpired term, by the appointing authority making the original appointment. Vacancies in appointments made by the General Assembly shall be filled in accordance with G.S. 120-122. Initial terms of office commenced July 1, 1994.

5. Auctioneers Commission

§ 85B-3. Auctioneers Commission.

(a) There shall be a five member North Carolina Auctioneers Commission having the powers and responsibilities set out in this Chapter. The Governor shall appoint the members of the Commission, at least three of whom, and their successors, may be from nominations submitted by the Auctioneers Association of North Carolina. The Auctioneers Association shall submit, within 45 days of when the vacancy occurs, at least three names for each position for which it is entitled to make a nomination. Of the initial five members of the Commission one shall be appointed for a one year term, two shall be appointed for two year terms and two for three year terms; thereafter, each new member shall be appointed for a term of three years. Any vacancy shall be filled for the remainder of the unexpired term only. Each member shall continue in

office until his successor is appointed and qualified. No member shall serve more than two complete consecutive terms.

(b) At least three members of the Commission shall be experienced auctioneers who are licensed under this Chapter. One member shall be a person who shall represent the public at large and shall not be licensed under this Chapter.

6. Board for Licensing of Geologists

§ 89E-4. North Carolina Board for Licensing of Geologists; appointments; terms; composition.

(b) The Board shall consist of five members appointed by the Governor in the manner hereinafter prescribed, and in addition the State geologist shall serve on the Board ex officio. The Governor may remove any member of the Board for neglect of duty or malfeasance or violation of this Chapter or conviction of a felony or other crime of moral turpitude, but for no other reason.

(d) All members of the initial Board shall be appointed by the Governor and shall at the time of their appointment qualify for licensing under this Chapter except for the lay member appointee. At all times at least one member of the Board shall be an academic geologist; one member shall be a salaried company geologist; one member shall be an independent or consultant geologist; one member shall be a representative from the mining industry; one member shall be a consumer or lay member who is not a geologist; and in addition, the State geologist shall serve as a permanent ex officio member.

7. Board for Licensing of Soil Scientists

§ 89F-4. North Carolina Board for Licensing of Soil Scientists.

(a) Creation; Membership.—The North Carolina Board for Licensing of Soil Scientists is created. The Board shall consist of seven members appointed as follows:

(1) One member appointed by the Governor, who shall be a soil scientist employed by a federal or State agency.

(2) One member appointed by the Governor, who shall be a soil scientist employed by a local government agency.

(3) One member appointed by the Governor, who shall be a soil scientist employed by an institution of higher education.

(4) One member appointed by the General Assembly upon recommendation of the Speaker of the House of Representatives, who shall be a soil scientist who is privately employed.

(5) One member appointed by the General Assembly upon recommendation of the Speaker of the House of Representatives, who shall be a member of the public who is not a soil scientist.

(6) One member appointed by the General Assembly upon recommendation of the President Pro Tempore of the Senate, who shall be a soil scientist who is privately employed.

(7) One member appointed by the General Assembly upon recommendation of the President Pro Tempore of the Senate, who shall be a member of the public who is not a soil scientist.

(b) Ex Officio Member.—In addition to the members of the Board appointed pursuant to subsection (a) of this section, the President of the Soil Science Society of North Carolina, or a member of the Society appointed by its President, shall serve as a nonvoting ex officio member of the Board.

8. Board of Architecture

§ 83A-2. North Carolina Board of Architecture; creation; appointment, terms and oath of members; vacancies; officers; bond of treasurer; notice of meetings; quorum.

(b) The Board shall consist of seven members appointed by the Governor. Five of the members of the Board shall be licensed architects appointed for five year terms; the terms shall be staggered so that the term of one architect member expires each year. No architect member shall be eligible to serve more than two consecutive terms; if a vacancy occurs during a term, the Governor shall appoint a person to fill the vacancy for the remainder of the unexpired term. Two of the members of the Board shall be persons who are not licensed architects and who represent the interest of the public at large; the Governor shall appoint these members not later than July 1, 1979. The public members shall have full voting powers and shall serve at the pleasure of the Governor. Each Board member shall file with the Secretary of State an oath faithfully to perform duties as a member of the Board, and to uphold the Constitution of North Carolina and the Constitution of the United States.

9. Board of Athletic Trainer Examiners

§ 90-524. Board of Examiners created.

(b) Composition and Terms.—The Board shall consist of seven members who shall serve staggered terms. Four members shall be athletic trainers certified by the National Athletic Trainers' Association Board of Certification, Inc. One member shall be a licensed orthopedic surgeon, one member shall be a licensed family practice physician or pediatrician, and one member shall represent the public at large.

The initial Board members shall be selected on or before August 1, 1997, as follows:

(1) The General Assembly, upon the recommendation of the President Pro Tempore of the Senate, shall appoint two certified athletic trainers and an orthopedic surgeon. The certified athletic trainers shall serve for terms of three years, and the orthopedic surgeon shall serve for a term of one year.

(2) The General Assembly, upon the recommendation of the Speaker of the House of Representatives, shall appoint two certified athletic trainers and a family practice physician or pediatrician. The certified athletic trainers and the family practice physician or pediatrician shall serve for terms of two years.

(3) The Governor shall appoint for a three year term a public member to the Board.

Upon the expiration of the terms of the initial Board members, each member shall be appointed for a term of three years and shall serve until a successor is appointed. No member may serve more than two consecutive full terms.

10. Board of Certified Public Accountant Examiners

§ 93-12. Board of Certified Public Accountant Examiners.

The name of the State Board of Accountancy is hereby changed to State Board of Certified Public Accountant Examiners and said name State Board of Certified Public Accountant Examiners is hereby substituted for the name State Board of Accountancy wherever the latter name appears or is used in Chapter 93 of the General Statutes. Said Board is created as an agency of the State of North Carolina and shall consist of seven members to be appointed by the Governor, five persons to be holders of valid and unrevoked certificates as certified public accountants issued under the provisions of this Chapter and two persons who are not certified public accountants who shall represent the interest of the public at large. Members of the Board shall hold office for the term of three years and until their successors are appointed. Appointments to the Board shall be made under the provisions of this Chapter as and when the terms of the members of the present State Board of Accountancy expire; provided, that all future appointments to said Board shall be made for a term of three years expiring on the thirtieth day of June. All Board members serving on June 30, 1980, shall be eligible to complete their respective terms. No member appointed to a term on or after July 1, 1980, shall serve more than two complete consecutive terms.

11. Board of Cosmetic Art Examiners

§ 88B-3. Creation and membership of the Board; term of office; removal for cause; officers.

(a) The North Carolina Board of Cosmetic Art Examiners is established. The Board shall consist of six members who shall be appointed as follows:

(1) The General Assembly, upon the recommendation of the President Pro Tempore of the Senate, shall appoint a cosmetologist.

(2) The General Assembly, upon the recommendation of the Speaker of the House of Representatives, shall appoint a cosmetologist.

(3) The Governor shall appoint two cosmetologists, a cosmetology teacher, and a member of the public who is not licensed under this Chapter.

12. Board of Dietetics/Nutrition

§ 90-353. Creation of Board.

(a) The North Carolina Board of Dietetics/Nutrition is created. The Board shall consist of seven members as follows:

(1) One member shall be a professional whose primary practice is clinical dietetics/nutrition;

(2) One member shall be a professional whose primary practice is community or public health dietetics/nutrition;

(3) One member shall be a professional whose primary practice is consulting in dietetics/nutrition;

(4) One member shall be a professional whose primary practice is in management of nutritional services;

(5) One member shall be an educator on the faculty of a college or university specializing in the field of dietetics/nutrition;

(6) Two members shall represent the public at large.

13. Board of Electrolysis Examiners

§ 88A-5. Creation and membership of Board.

(a) The North Carolina Board of Electrolysis Examiners is created. The Board shall consist of five members as follows:

(1) Three electrologists who have engaged in the practice of electrolysis for at least five years, one of whom shall be appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives, one of whom shall be appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate, and one of whom shall be appointed by the Governor.

(2) A physician licensed under Chapter 90 of the General Statutes, who shall be nominated by the North Carolina Medical Board and appointed by the Governor.

(3) A public member, appointed by the Governor, who has not practiced electrolysis, who is not in training to become an electrologist, and who is not related to anyone who would be prohibited by this subdivision from serving on the Board as a public member.

14. Board of Examiners for Speech and Language Pathologists and Audiologists

§ 90-303. Board of Examiners for speech and language pathology and audiology; qualifications, appointment and terms of members; vacancies; meetings, etc.

(a) There shall be a Board of Examiners for Speech and Language Pathologists and Audiologists, which shall be composed of seven members, who shall all be residents of this State. Two members shall have a paid work experience in audiology for at least five years and hold a North Carolina license as an audiologist. Two members shall have paid work experience in speech pathology for at least five years and hold a North Carolina license as a speech and language pathologist. One member shall be a physician who is licensed to practice medicine in the State of North Carolina. Two members shall be appointed by the Governor to represent the interest of the public at large. These two members shall be neither licensed speech and language pathologists nor audiologists. These members shall be appointed not later than July 1, 1981; one shall be initially appointed for a term of two years; the other shall be appointed for a term of three years. Thereafter all public members shall serve three year terms.

(b) The members of the Board shall be appointed by the Governor.

15. Board of Examiners in Optometry

§ 90-116. Board of Examiners in Optometry.

In order to properly regulate the practice of optometry, there is established a North Carolina State Board of Examiners in Optometry, which shall

consist of five regularly graduated optometrists who have been engaged in the practice of optometry in this State for at least five years and two members to represent the public at large.

No public member shall at any time be a health care provider, be related to or be the spouse of a health care provider, or have any pecuniary interest in the profitability of a health care provider. For purposes of this section, the term "health care provider" shall have the same meaning as provided in G.S. 58 47 5(4). The Governor shall appoint the two public members not later than July 1, 1981.

The optometric members of the Board shall be appointed by the Governor from a list provided by the North Carolina State Optometric Society. For each vacancy, the society must submit at least three names to the Governor. The society shall establish procedures for the nomination and election of optometrist members of the Board. These procedures shall be adopted under the rule making procedures described in Article 2A, Chapter 150B of the General Statutes, and notice of the proposed procedures shall be given to all licensed optometrists residing in North Carolina. Such procedures shall not conflict with the provisions of this section. Every optometrist with a current North Carolina license residing in the State shall be eligible to vote in all such elections, and the list of licensed optometrists shall constitute the registration list for elections. Any decision of the society relative to the conduct of such elections may be challenged by civil action in the Wake County Superior Court. A challenge must be filed not later than 30 days after the society has rendered the

decision in controversy, and all such cases shall be heard de novo.

All Board members serving on June 30, 1981, shall be eligible to complete their respective terms. No member appointed to a term on or after July 1, 1981, shall serve more than two complete consecutive five year terms, except that each member shall serve until his successor is chosen and qualifies.

The Governor may remove any member for good cause shown. Any vacancy in the optometrist membership of the Board shall be filled for the period of the unexpired term by the Governor from a list of at least three names submitted by the North Carolina State Optometric Society Executive Council. Any vacancy in the public membership of the Board shall be filled by the Governor for the unexpired term. (1909, c. 444, s. 3; 1915, c. 21, s. 1; C.S., s. 6689; 1935, c. 63; 1981, c. 496, s. 1; 1987, c. 827, s. 1; 2000 189, s. 5.)

16. Board of Funeral Service

§ 90-210.18A. Board of Funeral Service created; qualifications; vacancies; removal.

(b) The North Carolina Board of Funeral Service is created and shall regulate the practice of funeral service in this State. The Board shall have nine members as follows:

(1) Four members appointed by the Governor from nominees recommended by the North Carolina Funeral Directors Association, Inc. These members shall be persons licensed under this Article.

(2) Two members appointed by the Governor from nominees recommended by the Funeral Directors &

Morticians Association of North Carolina, Inc. These members shall be persons licensed under this Article.

(3) One member appointed by the Governor who is licensed under this Article and who is not affiliated with any funeral service trade association.

(4) One member appointed by the General Assembly, upon the recommendation of the President Pro Tempore of the Senate. This member shall be a person who is not licensed under this Article or employed by a person who is licensed under this Article.

(5) One member appointed by the General Assembly, upon the recommendation of the Speaker of the House of Representatives. This member shall be a person who is not licensed under this Article or employed by a person who is licensed under this Article.

Members of the Board shall serve staggered three year terms, ending on December 31 of the last year of the term or when a successor has been duly appointed, whichever is later. No member may serve more than two complete consecutive terms.

17. Board of Landscape Architects

§ 89A-3. North Carolina Board of Landscape Architects; appointments.

(a) There is created the North Carolina Board of Landscape Architects, consisting of seven members appointed by the Governor for four year staggered terms. Five members of the Board shall have been engaged in the practice of landscape architecture in North Carolina at least five years at the time of their respective appointments. Two members of the Board shall not be landscape architects and shall represent

the interest of the public at large. Each member shall hold office until the appointment and qualification of his or her successor. Vacancies occurring prior to the expiration of the term shall be filled by appointment for the unexpired term. No member shall serve more than two complete consecutive terms.

The Board shall be subject to the provisions of Chapter 93B of the General Statutes.

18. Board of Law Examiners

27 North Carolina Administrative Code 01C .0101. Election.

(a) At the first meeting of the council, it shall elect as members of the Board of Law Examiners, two members of the State Bar to serve for a term of one year from July 1, 1933; and two members of the State Bar to serve for a term of two years from July 1, 1933; and two members of the State Bar to serve for a term of three years from July 1, 1933. The council, at its regular meeting, in April of each year, beginning in 1934, shall elect two members of the Board of Law Examiners to take office on the 1st day of July of the year in which they are elected, and such members shall serve for a term of three years or until their successors are elected and qualified. Beginning with the year 1935 and every third year thereafter the council shall elect three members for a term of three years or until their successors are elected and qualified.

(b) No member of the council shall be a member of the Board of Law Examiners, and no member of the Board of Law Examiners shall be a member of the council.

19. Board of Licensed Professional Counselors

§ 90-333. North Carolina Board of Licensed Professional Counselors; appointments; terms; composition.

(a) For the purpose of carrying out the provisions of this Article, there is hereby created the North Carolina Board of Licensed Professional Counselors which shall consist of seven members appointed by the Governor in the manner hereinafter prescribed. Any State or nationally recognized professional association representing professional counselors may submit recommendations to the Governor for Board membership. The Governor may remove any member of the Board for neglect of duty or malfeasance or conviction of a felony or other crime of moral turpitude, but for no other reason.

(b) At least five members of the Board shall be licensed professional counselors except that initial appointees shall be persons who meet the educational and experience requirements for licensure as licensed professional counselors under the provisions of this Article; and two members shall be public at large members appointed from the general public. Composition of the Board as to the race and sex of its members shall reflect the population of the State and each member shall reside in a different congressional district.

(c) At all times the Board shall include at least one counselor primarily engaged in counselor education, at least one counselor primarily engaged in the public sector, at least one counselor primarily engaged in the private sector, and two licensed professional counselors at large.

20. Board of Massage and Bodywork Therapy

§ 90-625. North Carolina Board of Massage and Bodywork Therapy.

(a) The North Carolina Board of Massage and Bodywork Therapy is created. The Board shall consist of seven members who are residents of this State and are as follows:

(1) Five members shall be massage and bodywork therapists who have been licensed under this Article and have been in the practice of massage and bodywork therapy for at least five of the last seven years prior to their serving on the Board. Consideration shall be given to geographical distribution, practice setting, clinical specialty, involvement in massage and bodywork therapy education, and other factors that will promote diversity of the profession on the Board. Two of the five members shall be appointed by the General Assembly, upon the recommendation of the Speaker of the House of Representatives, two shall be appointed by the General Assembly, upon the recommendation of the President Pro Tempore of the Senate, and one shall be appointed by the Governor.

(2) One member shall be a physician licensed pursuant to Article 1 of Chapter 90 of the General Statutes or a person once licensed as a physician whose license lapsed while the person was in good standing with the profession and eligible for licensure. The appointment shall be made by the Governor and may be made from a list provided by the North Carolina Medical Society.

(3) One member shall be a member of the general public who shall not be licensed under Chapter 90 of the General Statutes or the spouse of a person who is

so licensed, or have any financial interest, directly or indirectly, in the profession regulated under this Article. The appointment shall be made by the Governor.

21. Board of Nursing

§ 90-171.21. Board of Nursing; composition; selection; vacancies; qualifications; term of office; compensation.

(a) The Board shall consist of 14 members. Eight members shall be registered nurses. Three members shall be licensed practical nurses. Three members shall be representatives of the public.

(b) Selection.—The North Carolina Board of Nursing shall conduct an election each year to fill vacancies of nurse members of the Board scheduled to occur during the next year. Nominations of candidates for election of registered nurse members shall be made by written petition signed by not less than 10 registered nurses eligible to vote in the election. Nominations of candidates for election of licensed practical nurse members shall be made by written petition signed by not less than 10 licensed practical nurses eligible to vote in the election. Every licensed registered nurse holding an active license shall be eligible to vote in the election of registered nurse board members. Every licensed practical nurse holding an active license shall be eligible to vote in the election of licensed practical nurse board members. The list of nominations shall be filed with the Board after January 1 of the year in which the election is to be held and no later than midnight of the first day of April of such year. Before preparing ballots, the Board shall notify each person who has been duly nominated of the person's nomination and

request permission to enter the person's name on the ballot. A member of the Board who is nominated for reelection and who does not withdraw the member's name from the ballot is disqualified to participate in conducting the election. Elected members shall begin their term of office on January 1 of the year following their election.

Nominations of persons to serve as public members of the Board may be made to the Governor or the General Assembly by any citizen or group within the State. The Governor shall appoint one public member to the Board, and the General Assembly shall appoint two public members to the Board. Of the public members appointed by the General Assembly, one shall be appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate, and one shall be appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives.

Board members shall be commissioned by the Governor upon their election or appointment.

22. Board of Occupational Therapy

§ 90-270.68. Establishment of Board, terms, vacancies, removal, meetings, compensation.

(a) Establishment of Board.—The North Carolina Board of Occupational Therapy is created. The Board shall consist of seven members who are appointed by the Governor and are residents of this State at the time of and during their appointment, as follows:

(1) Three members shall be occupational therapists and one member shall be an occupational therapy assistant. Each of these members shall be

licensed to practice in North Carolina and have practiced, taught, or engaged in research in occupational therapy for at least three of the five years immediately preceding appointment to the Board.

(2) One member shall be a physician in good standing with the North Carolina Medical Board and licensed by and registered with the North Carolina Medical Board to practice medicine in this State.

(3) One member shall represent the public at large and shall be a person who is not a health care provider licensed under this Chapter or the spouse of a licensed health care provider.

(4) One member shall be a counselor, educator, or school based professional certified or licensed under North Carolina law who is employed in the North Carolina public school system and is not an occupational therapist or an occupational therapy assistant.

The occupational therapist members and the occupational therapy assistant member shall be nominated by the North Carolina Occupational Therapy Association, Inc., following the use of a procedure made available to all occupational therapists and occupational therapy assistants licensed and residing in North Carolina. In soliciting nominations and compiling its list, the Association shall give consideration to geographic distribution, clinical specialty, and other factors that will promote representation of all aspects of occupational therapy practice. The records of the nomination procedures shall be filed with the Board and made available for a period of six months following nomination for

reasonable inspection by any licensed practitioner of occupational therapy.

The physician member shall be nominated by the North Carolina Occupational Therapy Association, Inc., after consultation with the North Carolina Medical Society. The counselor, educator, or school based professional member shall be nominated by the North Carolina Occupational Therapy Association, Inc., after consultation with the North Carolina School Counselors Association.

23. Board of Pharmacy

§ 90-85.7. Board of Pharmacy; selection; vacancies; commission; term; per diem; removal.

(a) The Board of Pharmacy shall consist of six persons. Five of the members shall be licensed as pharmacists within this State and shall be elected and commissioned by the Governor as hereinafter provided. Pharmacist members shall be chosen in an election held as hereinafter provided in which every person licensed to practice pharmacy in North Carolina and residing in North Carolina shall be entitled to vote. Each pharmacist member of said Board shall be elected for a term of five years and until his successor shall be elected and shall qualify. Members chosen by election under this section shall be elected upon the expiration of the respective terms of the members of the present Board of Pharmacy. No pharmacist shall be nominated for membership on said Board, or shall be elected to membership on said Board, unless, at the time of such nomination, and at the time of such election, he is licensed to practice pharmacy in North Carolina. In case of death, resignation or removal from the State of any pharmacist member of said Board, the pharmacist

members of the Board shall elect in his place a pharmacist who meets the criteria set forth in this section to fill the unexpired term.

One member of the Board shall be a person who is not a pharmacist and who represents the interest of the public at large. The Governor shall appoint this member.

All Board members serving on June 30, 1989, shall be eligible to complete their respective terms. No member appointed or elected to a term on or after July 1, 1989, shall serve more than two complete consecutive five year terms. The Governor may remove any member appointed by him for good cause shown and may appoint persons to fill unexpired terms of members appointed by him.

It shall be the duty of a member of the Board of Pharmacy, within 10 days after receipt of notification of his appointment and commission, to appear before the clerk of the superior court of the county in which he resides and take and subscribe an oath to properly and faithfully discharge the duties of his office according to law.

24. Board of Physical Therapy Examiners

§ 90-270.25. Board of Examiners.

The North Carolina Board of Physical Therapy Examiners is hereby created. The Board shall consist of eight members, including one medical doctor licensed and residing in North Carolina, four physical therapists, two physical therapist assistants, and one public member. The public member shall be appointed by the Governor and shall be a person who is not licensed under Chapter 90 who shall represent the interest of the public at large. The medical

doctor, physical therapists, and physical therapists assistants shall be appointed by the Governor from a list compiled by the North Carolina Physical Therapy Association, Inc., following the use of a nomination procedure made available to all physical therapists and physical therapist assistants licensed and residing in North Carolina. In soliciting nominations and compiling its list, the Association will give consideration to geographic distribution, practice setting (institution, independent, academic, etc.), and other factors that will promote representation of all aspects of physical therapy practice on the Board. The records of the operation of the nomination procedure shall be filed with the Board, to be available for a period of six months following nomination, for reasonable inspection by any licensed practitioner. Each physical therapist member of the Board shall be licensed and reside in this State; provided that the physical therapist shall have not less than three years' experience as a physical therapist immediately preceding appointment and shall be actively engaged in the practice of physical therapy in North Carolina during incumbency. Each physical therapist assistant member shall be licensed and reside in this State; provided that the physical therapist assistant shall have not less than three years' experience as a physical therapist assistant immediately preceding appointment and shall be actively engaged in practice as a physical therapist assistant in North Carolina during incumbency.

Members shall be appointed to serve three year terms, or until their successors are appointed, to commence on January 1 in respective years. In the event that a member of the Board for any reason shall become ineligible to or cannot complete a term

of office, another appointment shall be made by the Governor, in accordance with the procedure stated above, to fill the remainder of the term. No member may serve for more than two successive three year terms.

The Board each year shall designate one of its physical therapist members as chairman and one member as secretary treasurer. Each member of the Board shall receive such per diem compensation and reimbursement for travel and subsistence as shall be set for licensing boards generally. (1951, c. 1131, s. 2; 1969, c. 445, s. 7; c. 556; 1979, c. 487; 1981, c. 765, s. 1; 1981 (Reg. Sess., 1982), c. 1191, s. 82; 1985, c. 701, s. 1.)

25. Board of Podiatry Examiners

§ 90-202.4. Board of Podiatry Examiners; terms of office; powers; duties.

(a) There shall be established a Board of Podiatry Examiners for the State of North Carolina. This Board shall consist of four members appointed by the Governor. Three of the members shall be licensed podiatrists who have practiced podiatry in North Carolina for not less than seven years immediately preceding their election and who are elected and nominated to the Governor as hereinafter provided. The other member shall be a person chosen by the Governor to represent the public at large. The public member shall not be a health care provider nor may he or she be the spouse of a health care provider. For purposes of Board membership, "health care provider" means any licensed health care professional and any agent or employee of any health care institution, health care insurer, health care professional school, or a member of any allied health

profession. For purposes of this section, a person enrolled in a program to prepare him to be a licensed health care professional or an allied health professional shall be deemed a health care provider. For purposes of this section, any person with significant financial interest in a health service or profession is not a public member.

26. Code Officials Qualification Board

§ 143-151.9. North Carolina Code Officials Qualification Board established; members; terms; vacancies.

(a) There is hereby established the North Carolina Code Officials Qualification Board in the Department of Insurance. The Board shall be composed of 20 members appointed as follows:

(1) One member who is a city or county manager;

(2) Two members, one of whom is an elected official representing a city over 5,000 population and one of whom is an elected official representing a city under 5,000 population;

(3) Two members, one of whom is an elected official representing a county over 40,000 population and one of whom is an elected official representing a county under 40,000 population;

(4) Two members serving as building officials with the responsibility for administering building, plumbing, electrical and heating codes, one of whom serves a county and one of whom serves a city;

(5) One member who is a registered architect;

(6) One member who is a registered engineer;

(7) Two members who are licensed general contractors, at least one of whom specializes in residential construction;

(8) One member who is a licensed electrical contractor;

(9) One member who is a licensed plumbing or heating contractor;

(10) One member selected from the faculty of the North Carolina State University School of Engineering and one member selected from the faculty of the School of Engineering of the North Carolina Agricultural and Technical State University;

(11) One member selected from the faculty of the School of Government at the University of North Carolina at Chapel Hill;

(12) One member selected from the Community Colleges System Office;

(13) One member selected from the Division of Engineering and Building Codes in the Department of Insurance; and,

(14) One member who is a local government fire prevention inspector and one member who is a citizen of the State.

The various categories shall be appointed as follows: (1), (2), (3), and (14) by the Governor; (4), (5), and (6) by the General Assembly upon the recommendation of the President Pro Tempore in accordance with G.S. 120-121; (7), (8), and (9) by the General Assembly upon the recommendation of the Speaker of the House of Representatives in accordance with G.S. 120-121; (10) by the deans of the respective schools of engineering of the named universities; (11) by the

Dean of the School of Government at the University of North Carolina at Chapel Hill; (12) by the President of the Community Colleges System; and (13) by the Commissioner of Insurance.

(b) The members shall be appointed for staggered terms and the initial appointments shall be made prior to September 1, 1977, and the appointees shall hold office until July 1 of the year in which their respective terms expire and until their successors are appointed and qualified as provided hereafter:

For the terms of one year: the members from subdivisions (1), (6) and (10) of subsection (a), and one member from subdivision (3).

For the terms of two years: the member from subdivision (11) of subsection (a), one member from subdivision (2), one member from subdivision (4), one member from subdivision (7), and one member from subdivision (14).

For the terms of three years: the members from subdivisions (8) and (12) of subsection (a), one member from subdivision (2), one member from subdivision (4), and one member from subdivision (14).

For the terms of four years: the members from subdivision (5), (9) and (13) of subsection (a), one member from subdivision (3), and one member from subdivision (7).

Thereafter, as the term of each member expires, his successor shall be appointed for a term of four years. Notwithstanding the appointments for a term of years, each member shall serve at the will of the Governor.

Members of the Board who are public officers shall serve ex officio and shall perform their duties on the Board in addition to the duties of their office.

(c) Vacancies in the Board occurring for any reason shall be filled for the unexpired term by the person making the appointment. (1977, c. 531, s. 1; 1987, c. 564, s. 28; 1989, c. 681, s. 16; 1995, c. 490, s. 12(a); 1999 84, s. 22; 2006 264, s. 29(m).)

27. Home Inspector Licensure Board

§ 143-151.46. North Carolina Home Inspector Licensure Board established; members; terms; vacancies.

(a) Membership.—The North Carolina Home Inspector Licensure Board is established in the Department of Insurance. The Board shall be composed of the Commissioner of Insurance or the Commissioner's designee and seven additional members appointed as follows:

(1) A public member who is not in one of the professional categories in subdivisions (2) through (4) of this subsection, appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives.

(2) Four home inspectors, two of whom shall be appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate, one of whom shall be appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives, and one of whom shall be appointed by the Governor.

(3) A licensed general contractor appointed by the Governor upon the recommendation of the North Carolina Home Builders Association.

(4) A licensed real estate broker appointed by the Governor upon the recommendation of the North Carolina Association of Realtors.

All members of the Board must be citizens of the State. Appointments by the General Assembly must be made in accordance with G.S. 120-121.

28. Interpreter and Transliterator Licensing Board

§ 90D-5. Creation of the Board.

(a) The North Carolina Interpreter and Transliterator Licensing Board is created.

(b) Composition and Terms.—The Board shall consist of nine members who shall serve staggered terms. The initial Board members shall be selected on or before July 1, 2003, as follows:

(1) A member of the North Carolina Association of the Deaf (NCAD) who is deaf and familiar with the interpreting process. This member shall be appointed by the Governor and serve for a term of two years.

(2) An interpreter who is a member of the North Carolina Registry of Interpreters for the Deaf, Inc., (NCRID) with five years experience in a community setting and who is licensed to practice as an interpreter or transliterator under this Chapter. This member shall be appointed by the Governor and serve for a term of three years.

(3) An employee of the North Carolina Department of Health and Human Services. This member shall be appointed by the Governor, upon recommendation of the Secretary of the Department, and serve a term of three years.

(4) An interpreter or transliterator for deaf blind individuals who is licensed to practice as an interpreter or transliterator under this Chapter or a deaf blind individual who is a member of the North Carolina Deaf Blind Association and who has knowledge of the interpreting process. This member shall be appointed by the General Assembly, upon recommendation of the President Pro Tempore of the Senate, and serve for a term of three years.

(5) A cued speech or oral transliterator licensed to practice as an interpreter or transliterator under this Chapter. This member shall be appointed by the General Assembly, upon recommendation of the President Pro Tempore of the Senate, and serve for a term of two years.

(6) A member of Self Help for Hard of Hearing (SHHH) with knowledge of the interpreting process and deafness. This member shall be appointed by the General Assembly, upon recommendation of the President Pro Tempore of the Senate, and serve for a term of three years.

(7) An interpreter who is a member of the North Carolina Registry of Interpreters for the Deaf, Inc., (NCRID) with five years experience in an educational setting in grades K 12 and who is licensed to practice as an interpreter or transliterator under this Chapter. This member shall be appointed by the General Assembly, upon recommendation of the Speaker of the House of Representatives, and serve for a term of two years.

(8) A faculty member of an Interpreter Training Program (ITP), an Interpreter Preparation Program (IPP), or a qualified or professional certified instructor of the American Sign Language Teachers

Association (ASLTA). This member shall be appointed by the General Assembly, upon recommendation of the Speaker of the House of Representatives, and serve for a term of two years.

(9) A public member. This member shall be appointed by the General Assembly, upon recommendation of the Speaker of the House of Representatives, and serve a term of two years. For purposes of this section, a public member shall not be licensed under this Chapter or have an immediate family member who is deaf or hard of hearing.

Upon the expiration of the terms of the initial Board members, each member shall be appointed for a term of three years and shall serve until a successor is appointed and qualified. No member may serve more than two consecutive full terms.

29. Irrigation Contractors' Licensing Board

§ 89G-4. The North Carolina Irrigation Contractors' Licensing Board.

(a) Composition and Terms.—The North Carolina Irrigation Contractors' Licensing Board is created. The Board shall consist of nine members who shall serve staggered terms. The initial Board shall be selected on or before October 1, 2008, as follows:

(1) The Commissioner of Agriculture, upon the recommendation of the Carolinas Irrigation Association, shall appoint two irrigation contractors, one to serve a one year term and one to serve a three year term.

(2) The General Assembly, upon the recommendation of the Speaker of the House of Representatives and pursuant to recommendations from the North Carolina Green Industry Council,

shall appoint two members, one who is a registered landscape contractor in good standing with the North Carolina Landscape Contractors Registration Board to serve a one year term and one who is an irrigation contractor to serve a three year term.

(3) The General Assembly, upon the recommendation of the President Pro Tempore of the Senate, shall appoint two irrigation contractors, one to serve a one year term and one to serve a two year term.

(4) The President of The University of North Carolina System shall appoint one member from within the ranks of the land grant university community who is knowledgeable in irrigation methods and practices to serve a three year term. The position is open to both current employees of The University of North Carolina System and persons who have earned emeritus status with The University of North Carolina System.

(5) The Board of Directors of the North Carolina Chapter of the American Society of Landscape Architects shall appoint one member who is a registered landscape architect to serve a two year term.

(6) The Governor shall appoint one public member to serve a two year term.

Upon the expiration of the terms of the initial Board members, each member shall be appointed by the appointing authorities designated in subdivisions (1) through (6) of this subsection for a three year term and shall serve until a successor is appointed and qualified. No member may serve more than two consecutive full terms.

30. Landscape Contractors' Registration Board

§ 89D-4. Landscape Contractors' Registration Board created; membership; compensation; power, etc.

(a) There is created the North Carolina Landscape Contractors' Registration Board (hereinafter called the Board) which shall issue registration certificates of title to landscape contractors. The Board shall be composed of nine members appointed as follows: Two by the Governor to represent the public at large; two by the Commissioner of Agriculture; two practicing nurserymen operating a nursery certified by the North Carolina Department of Agriculture and Consumer Services Plant Pest Inspection Program appointed by the Board of Directors of the North Carolina Association of Nurserymen, Inc.; two registered landscape contractors in the business of landscape contracting appointed by the Board of Directors of the North Carolina Landscape Contractors' Association, Inc.; and one registered landscape architect appointed by the Board of Directors of the North Carolina Chapter of the American Society of Landscape Architects. All appointments shall be for three year terms and no member shall serve more than two complete consecutive terms.

Any vacancy on the Board created by death, resignation or otherwise shall be filled for the unexpired term by the initial appointing authority and all members shall serve until their successors are appointed and qualify.

31. Locksmith Licensing Board

§ 74F-5. North Carolina Locksmith Licensing Board.

(a) Composition and Terms.—The Board shall consist of nine members who shall serve staggered terms. Three members shall represent the public. The initial Board members shall be appointed on or before January 1, 2002, as follows:

(1) The General Assembly, upon the recommendation of the President Pro Tempore of the Senate, shall appoint three locksmiths, two of whom shall serve terms of four years and one of whom shall serve a term of three years. At least one of the locksmiths shall represent a recognized locksmith organization in the State.

(2) The General Assembly, upon the recommendation of the Speaker of the House of Representatives, shall appoint three locksmiths, one of whom shall serve a term of four years, one of whom shall serve a term of three years, and one of whom shall serve a term of two years. At least one of the locksmiths shall represent a recognized locksmith organization in the State.

(3) The Governor shall appoint three public members, one of whom shall serve a term of three years and two of whom shall serve terms of two years.

Upon the expiration of the terms of the initial Board members, each member shall be appointed for a term of three years and shall serve until a successor is appointed. No member may serve more than two consecutive terms.

32. Marriage and Family Therapy Licensure Board

§ 90-270.49. North Carolina Marriage and Family Therapy Licensure Board.

(a) Establishment.—There is established as an agency of the State of North Carolina the North Carolina Marriage and Family Therapy Licensure Board, which shall be composed of seven Board members to be appointed as provided in G.S. 90 270.50. Board members shall be appointed for terms of four years each, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the Board member whom the appointee shall succeed. Upon the expiration of a Board member's term of office, the Board member shall continue to serve until a successor has qualified. No person may be appointed more than once to fill an unexpired term or for more than two consecutive full terms. The Board shall elect a chair and vice chair from its membership to serve a term of four years. No person may serve as chairperson for more than four years.

The Governor may remove any member from the Board or remove the chairperson from the position of chairperson only for neglect of duty, malfeasance, or conviction of a felony or crime of moral turpitude while in office.

No Board member shall participate in any matter before the Board in which the member has a pecuniary interest, personal bias, or other similar conflict of interest.

§ 90-270.50. Appointment and qualification of Board members.

(a) Nominations for Appointment.—The Governor shall appoint members of the Board only from among the candidates who meet the following qualifications:

(1) Four members shall be practicing marriage and family therapists who are licensed marriage and family therapists in the State at the time of their appointment, each of whom has been for at least five years immediately preceding appointment actively engaged as a marriage and family therapist in rendering professional services in marriage and family therapy, or in the education and training of graduate or postgraduate students of marriage and family therapy, and has spent the majority of the time devoted to this activity in this State during the two years preceding appointment.

(2) Three members shall be representatives of the general public who have no direct affiliation with the practice of marriage and family therapy.

33. Medical Board

§ 90-2. Medical Board.

(a) There is established the North Carolina Medical Board to regulate the practice of medicine and surgery for the benefit and protection of the people of North Carolina. The Board shall consist of 12 members.

(1) Seven of the members shall be duly licensed physicians recommended by the Review Panel and appointed by the Governor as set forth in G.S. 90 3.

(2) The remaining five members shall all be appointed by the Governor as follows:

a. One shall be a duly licensed physician who is a doctor of osteopathy or a full time faculty member of one of the medical schools in North Carolina who utilizes integrative medicine in that person's clinical practice or a member of The Old North State Medical Society. This Board position shall not be subject to recommendations of the Review Panel pursuant to G.S. 90 3.

b. Three shall be public members, and these Board positions shall not be subject to recommendations of the Review Panel pursuant to G.S. 90 3. A public member shall not be a health care provider nor the spouse of a health care provider. For the purpose of Board membership, "health care provider" means any licensed health care professional, agent or employee of a health care institution, health care insurer, health care professional school, or a member of any allied health profession. For purposes of this section, a person enrolled in a program as preparation to be a licensed health care professional or an allied health professional shall be deemed a health care provider. For purposes of this section, any person with significant financial interest in a health service or profession is not a public member.

c. One shall be a physician assistant as defined in G.S. 90 18.1 or a nurse practitioner as defined in G.S. 90 18.2 as recommended by the Review Panel pursuant to G.S. 90 3.

34. On-Site Wastewater Contractors and Inspectors Certification Board

§ 90A-73. Creation and membership of the Board.

(a) Creation and Appointments.—There is created the North Carolina On Site Wastewater Contractors

and Inspectors Certification Board. The Board shall consist of nine members appointed to three year terms as follows:

(1) One member appointed by the Governor who, at the time of appointment, is engaged in the construction, installation, repair, or inspection of on site wastewater systems, to a term that expires on 1 July of years that precede by one year those years that are evenly divisible by three.

(2) One member appointed by the Governor who, at the time of appointment, is a certified water pollution control system operator pursuant to Article 3 of this Chapter, to a term that expires on 1 July of years evenly divisible by three.

(3) One member appointed by the Governor who is an employee of the Division of Environmental Health of the Department to a term that expires on 1 July of years that follow by one year those years that are evenly divisible by three.

(4) One member appointed by the General Assembly upon recommendation of the President Pro Tempore of the Senate who, at the time of appointment, is engaged in the construction, installation, repair, or inspection of on site wastewater systems, to a term that expires on 1 July of years that follow by one year those years that are evenly divisible by three.

(5) One member appointed by the General Assembly upon recommendation of the President Pro Tempore of the Senate who, at the time of appointment, is engaged in the business of inspecting on site wastewater systems, to a term that expires on 1 July of years that precede by one year those years that are evenly divisible by three.

(6) One member appointed by the General Assembly upon recommendation of the President Pro Tempore of the Senate upon the recommendation of the North Carolina Home Builders Association, to a term that expires on 1 July of years evenly divisible by three.

(7) One member appointed by the General Assembly upon recommendation of the Speaker of the House of Representatives who, at the time of appointment, is engaged in the construction, installation, repair, or inspection of on site wastewater systems, to a term that expires on 1 July of years evenly divisible by three.

(8) One member appointed by the General Assembly upon recommendation of the Speaker of the House of Representatives who, at the time of appointment, is (i) employed as an environmental health specialist, and (ii) engaged primarily in the inspection and permitting of on site wastewater systems, to a term that expires on 1 July of years that follow by one year those years that are evenly divisible by three.

(9) One member appointed by the General Assembly upon recommendation of the Speaker of the House of Representatives who, at the time of appointment, is (i) employed by the North Carolina Cooperative Extension Service, and (ii) is knowledgeable in the area of on site wastewater systems, to a term that expires on 1 July of years that precede by one year those years that are evenly divisible by three.

35. Private Protective Services Board

§ 74C-4. Private Protective Services Board established; members; terms; vacancies; compensation; meetings.

(b) The Board shall consist of 14 members: the Attorney General or his designated representative, two persons appointed by the Attorney General, one person appointed by the Governor, five persons appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate, and five persons appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives. All appointments by the General Assembly shall be subject to the provisions of G.S. 120-121, and vacancies in the positions filled by those appointments shall be filled pursuant to G.S. 120-122. One of those persons appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate and all five persons appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives shall be licensees under this Chapter; all other appointees may not be licensees of the Board nor licensed by the Board while serving as Board members. All persons appointed shall serve terms of three years. With the exception of the Attorney General or his designated representative, no person shall serve more than eight consecutive years on the Board, including years of service prior and subsequent to July 1, 1983. Board members may continue to serve until their successors have been appointed.

36. Psychology Board

§ 90-270.6. Psychology Board; appointment; term of office; composition.

For the purpose of carrying out the provisions of this Article, there is created a North Carolina Psychology Board, which shall consist of seven members appointed by the Governor. At all times three members shall be licensed psychologists, two members shall be licensed psychological associates, and two members shall be members of the public who are not licensed under this Article. The Governor shall give due consideration to the adequate representation of the various fields and areas of practice of psychology and to adequate representation from various geographic regions in the State. Terms of office shall be three years. All terms of service on the Board expire June 30 in appropriate years. As the term of a psychologist member expires, or as a vacancy of a psychologist member occurs for any other reason, the North Carolina Psychological Association, or its successor, shall, having sought the advice of the chairs of the graduate departments of psychology in the State, for each vacancy, submit to the Governor a list of the names of three eligible persons. From this list the Governor shall make the appointment for a full term, or for the remainder of the unexpired term, if any. Each Board member shall serve until his or her successor has been appointed. As the term of a member expires, or if one should become vacant for any reason, the Governor shall appoint a new member within 60 days of the vacancy's occurring. No member, either public or licensed under this Article, shall serve more than three complete consecutive terms. (1967, c. 910, s. 6;

1977, c. 670, s. 5; 1979, c. 670, s. 3; c. 1005, s. 2; 1983, c. 82, ss. 1 3; 1993, c. 375, s. 1; 2007 468, s. 3.)

37. Recreational Therapy Licensure Board

§ 90C-23. North Carolina Recreational Therapy Licensure Board is created

(b) Composition.—The Board shall consist of eight members appointed as follows:

(1) Three practicing recreational therapists, one of whom shall be appointed by the Governor, one of whom shall be appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate, and one of whom shall be appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives.

(2) One licensed practicing recreational therapy assistant appointed by the Governor.

(3) One licensed practicing recreational therapist who is engaged primarily in providing education or training for recreational therapists or recreational therapy assistants appointed by the Governor.

(4) One physician licensed pursuant to Article 1 of Chapter 90 of the General Statutes appointed by the Governor.

(5) Two public members, one of whom shall be appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate and one of whom shall be appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives.

The Governor shall make appointments after consultation with the North Carolina Recreational

Therapy Licensure Board and other interested persons.

38. Real Estate Commission

§ 93A-3. Commission created; compensation; organization.

(a) There is hereby created the North Carolina Real Estate Commission, hereinafter called the Commission. The Commission shall consist of nine members, seven members to be appointed by the Governor, one member to be appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate in accordance with G.S. 120-121, and one member to be appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives in accordance with G.S. 120-121. At least three members of the Commission shall be licensed real estate brokers. At least two members of the Commission shall be persons who are not involved directly or indirectly in the real estate or real estate appraisal business. Members of the Commission shall serve three year terms, so staggered that the terms of three members expire in one year, the terms of three members expire in the next year, and the terms of three members expire in the third year of each three year period. The members of the Commission shall elect one of their members to serve as chairman of the Commission for a term of one year. The Governor may remove any member of the Commission for misconduct, incompetency, or willful neglect of duty. The Governor shall have the power to fill all vacancies occurring on the Commission, except vacancies in legislative appointments shall be filled under G.S. 120-122.

39. Respiratory Care Board

§ 90-649. North Carolina Respiratory Care Board; creation.

(a) The North Carolina Respiratory Care Board is created. The Board shall consist of 10 members as follows:

(1) Two members shall be respiratory care practitioners.

(2) Four members shall be physicians licensed to practice in North Carolina, and whose primary practice is Pulmonology, Anesthesiology, Critical Care Medicine, or whose specialty is Cardiothoracic Disorders.

(3) One member shall represent the North Carolina Hospital Association.

(4) One member shall represent the North Carolina Association of Medical Equipment Services.

(5) Two members shall represent the public at large.

40. Small Business Contractor Authority

§ 143B-472.102. Authority creation; powers.

(b) Membership.—The Authority consists of 11 members appointed as follows:

(1) Four members appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate, one of whom has experience in underwriting surety bonds.

(2) Four members appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives, one of whom is a present or former governmental employee with experience in administering public contracts.

(3) Three members appointed by the Governor, one of whom is a licensed general contractor and one of whom is experienced in working for private, nonprofit, small, or underutilized businesses.

41. Social Work Certification and Licensure Board

§ 90B-5. North Carolina Social Work Certification and Licensure Board; appointments; terms; composition.

(a) For the purpose of carrying out the provisions of this Chapter, there is hereby created the North Carolina Social Work Certification and Licensure Board which shall consist of seven members appointed by the Governor as follows:

(1) At least two members of the Board shall be Certified Social Workers or Certified Master Social Workers, three members shall be Licensed Clinical Social Workers, and two members shall be appointed from the public at large. Composition of the Board as to the race and sex of its members shall reflect the composition of the population of the State of North Carolina.

(2) At all times the Board shall include at least one member primarily engaged in social work education, at least one member primarily engaged in social work in the public sector, and at least one member primarily engaged in social work in the private sector.

(3) All members of the Board shall be residents of the State of North Carolina, and with the exception of the public members, shall be certified or licensed by the Board under the provisions of this Chapter. Professional members of the Board must be actively engaged in the practice of social work or in the

education and training of students in social work, and have been for at least three years prior to their appointment to the Board. Such activity during the two years preceding the appointment shall have occurred primarily in this State.

42. State Bar Council

§ 84-22. Officers and committees of the North Carolina State Bar.

The officers of the North Carolina State Bar and the Council shall consist of a president, president elect, vice president and an immediate past president, who shall be deemed members of the Council in all respects. The president, president elect and vice president need not be members of the Council at the time of their election. There shall be a secretary treasurer who shall also have the title of executive director, but who shall not be a member of the Council. All officers shall be elected annually by the Council at an election to take place at the annual meeting of the North Carolina State Bar. The regular term of all officers is one year. The Council is the judge of the election and qualifications of its members.

In addition to the committees and commissions as may be specifically established or authorized by law, the North Carolina State Bar may have committees, standing or special, as from time to time the Council deems appropriate for the proper discharge of the duties and functions of the North Carolina State Bar. The Council shall determine the number of members, composition, method of appointment or election, functions, powers and duties, structure, authority to act, and other matters relating to each committee. Any committee may, at the discretion of the

appointing or electing authority, be composed of Council members or members of the North Carolina State Bar who are not members of the Council, or of lay persons, or of any combination. (1933, c. 210, s. 8; 1941, c. 344, ss. 4, 5; 1973, c. 1152, s. 3; 1979, c. 570, s. 5; 1995, c. 431, s. 15.)

43. State Board of Barber Examiners

§ 86A-4. State Board of Barber Examiners; appointment and qualifications; term of office; removal.

(a) The State Board of Barber Examiners is established to consist of five members appointed by the Governor. Four shall be licensed barbers; the other shall be a person who is not licensed under this Chapter and who shall represent the interest of the public at large.

44. State Board of Chiropractic Examiners

§ 90-139. Creation and membership of Board of Examiners.

(a) The State Board of Chiropractic Examiners is created to consist of eight members appointed by the Governor and General Assembly. Six of the members shall be practicing doctors of chiropractic, who are residents of this State and who have actively practiced chiropractic in the State for at least eight consecutive years immediately preceding their appointments; four of these six members shall be appointed by the Governor, and two by the General Assembly in accordance with G.S. 120-121, one each upon the recommendation of the President Pro Tempore of the Senate and the Speaker of the House of Representatives. No more than three members of the Board may be graduates of the same college or

school of chiropractic. The other two members shall be persons chosen by the Governor to represent the public at large. The public members shall not be health care providers nor the spouses of health care providers. For purposes of Board membership, "health care provider" means any licensed health care professional and any agent or employee of any health care institution, health care insurer, health care professional school, or a member of any allied health profession. For purposes of this section, a person enrolled in a program to prepare him to be a licensed health care professional or an allied health professional shall be deemed a health care provider. For purposes of this section, any person with significant financial interest in a health service or profession is not a public member.

45. State Board of Dental Examiners

§ 90-22. Practice of dentistry regulated in public interest; Article liberally construed; Board of Dental Examiners; composition; qualifications and terms of members; vacancies; nominations and elections; compensation; expenditures by Board.

(b) The North Carolina State Board of Dental Examiners heretofore created by Chapter 139, Public Laws 1879 and by Chapter 178, Public Laws 1915, is hereby continued as the agency of the State for the regulation of the practice of dentistry in this State. Said Board of Dental Examiners shall consist of six dentists who are licensed to practice dentistry in North Carolina, one dental hygienist who is licensed to practice dental hygiene in North Carolina and one person who shall be a citizen and resident of North Carolina and who shall be licensed to practice neither dentistry nor dental hygiene. The dental hygienist or

the consumer member cannot participate or vote in any matters of the Board which involves the issuance, renewal or revocation of the license to practice dentistry in the State of North Carolina. The consumer member cannot participate or vote in any matters of the Board which involve the issuance, renewal or revocation of the license to practice dental hygiene in the State of North Carolina. Members of the Board licensed to practice dentistry in North Carolina shall have been elected in an election held as hereinafter provided in which every person licensed to practice dentistry in North Carolina and residing or practicing in North Carolina shall be entitled to vote. Each member of said Board shall be elected for a term of three years and until his successor shall be elected and shall qualify. Each year there shall be elected two dentists for such terms of three years each. Every three years there shall be elected one dental hygienist for a term of three years. Dental hygienists shall be elected to the Board in an election held in accordance with the procedures hereinafter provided in which those persons licensed to practice dental hygiene in North Carolina and residing or practicing in North Carolina shall be entitled to vote. Every three years a person who is a citizen and resident of North Carolina and licensed to practice neither dentistry nor dental hygiene shall be appointed to the Board for a term of three years by the Governor of North Carolina. Any vacancy occurring on said Board shall be filled by a majority vote of the remaining members of the Board to serve until the next regular election conducted by the Board, at which time the vacancy will be filled by the election process provided for in this Article, except that when the seat on the Board held by a

person licensed to practice neither dentistry nor dental hygiene in North Carolina shall become vacant, the vacancy shall be filled by appointment by the Governor for the period of the unexpired term. No dentist shall be nominated for or elected to membership on said Board, unless, at the time of such nomination and election such person is licensed to practice dentistry in North Carolina and actually engaged in the practice of dentistry. No dental hygienist shall be nominated for or elected to membership on said Board unless, at the time of such nomination and election, such person is licensed to practice dental hygiene in North Carolina and is currently employed in dental hygiene in North Carolina. No person shall be nominated, elected, or appointed to serve more than two consecutive terms on said Board.

(c) Nominations and elections of members of the North Carolina State Board of Dental Examiners shall be as follows:

(1) An election shall be held each year to elect successors to those members whose terms are expiring in the year of the election, each successor to take office on the first day of August following the election and to hold office for a term of three years and until his successor has been elected and shall qualify; provided that if in any year the election of the members of such Board for that year shall not have been completed by August 1 of that year, then the said members elected that year shall take office immediately after the completion of the election and shall hold office until the first of August of the third year thereafter and until their successors are elected and qualified. Persons appointed to the Board by the

Governor shall take office on the first day of August following their appointment and shall hold office for a term of three years and until such person's successor has been appointed and shall qualify; provided that if in any year the Governor shall not have appointed a person by August first of that year, then the said member appointed that year shall take office immediately after his appointment and shall hold office until the first of August of the third year thereafter and until such member's successor is appointed and qualified.

(2) Every dentist with a current North Carolina license residing or practicing in North Carolina shall be eligible to vote in elections of dentists to the Board. Every dental hygienist with a current North Carolina license residing or practicing in North Carolina shall be eligible to vote in elections of dental hygienists to the Board. The holding of such a license to practice dentistry or dental hygiene in North Carolina shall constitute registration to vote in such elections. The list of licensed dentists and dental hygienists shall constitute the registration list for elections to the appropriate seats on the Board.

(3) All elections shall be conducted by the Board of Dental Examiners which is hereby constituted a Board of Dental Elections. If a member of the Board of Dental Examiners whose position is to be filled at any election is nominated to succeed himself, and does not withdraw his name, he shall be disqualified to serve as a member of the Board of Dental Elections for that election and the remaining members of the Board of Dental Elections shall proceed and function without his participation.

(4) Nomination of dentists for election shall be made to the Board of Dental Elections by a written petition signed by not less than 10 dentists licensed to practice in North Carolina and residing or practicing in North Carolina. Nomination of dental hygienists for election shall be made to the Board of Dental Elections by a written petition signed by not less than 10 dental hygienists licensed to practice in North Carolina and residing or practicing in North Carolina. Such petitions shall be filed with said Board of Dental Elections subsequent to January 1 of the year in which the election is to be held and not later than midnight of the twentieth day of May of such year, or not later than such earlier date (not before April 1) as may be set by the Board of Dental Elections: provided, that not less than 10 days' notice of such earlier date shall be given to all dentists or dental hygienists qualified to sign a petition of nomination. The Board of Dental Elections shall, before preparing ballots, notify all persons who have been duly nominated of their nomination.

(5) Any person who is nominated as provided in subdivision (4) above may withdraw his name by written notice delivered to the Board of Dental Elections or its designated secretary at any time prior to the closing of the polls in any election.

(6) Following the close of nominations, there shall be prepared, under and in accordance with such rules and regulations as the Board of Dental Elections shall prescribe, ballots containing, in alphabetical order, the names of all nominees; and each ballot shall have such method of identification, and such instructions and requirements printed thereon, as shall be prescribed by the Board of Dental Elections.

At such time as may be fixed by the Board of Dental Elections a ballot and a return official envelope addressed to said Board shall be mailed to each person entitled to vote in the election being conducted, together with a notice by said Board designating the latest day and hour for return mailing and containing such other items as such Board may see fit to include. The said envelope shall bear a serial number and shall have printed on the left portion of its face the following:

"Serial No. of Envelope _____
Signature of Voter _____
Address of Voter _____
_____

(Note: The enclosed ballot is not valid unless the signature of the voter is on this envelope)."

The Board of Dental Elections may cause to be printed or stamped or written on said envelope such additional notice as it may see fit to give. No ballot shall be valid or shall be counted in an election unless, within the time hereinafter provided, it has been delivered to said Board by hand or by mail and shall be sealed. The said Board by rule may make provision for replacement of lost or destroyed envelopes or ballots upon making proper provisions to safeguard against abuse.

(7) The date and hour fixed by the Board of Dental Elections as the latest time for delivery by hand or mailing of said return ballots shall be not earlier than the tenth day following the mailing of the envelopes and ballots to the voters.

(8) The said ballots shall be canvassed by the Board of Dental Elections beginning at noon on a day

and at a place set by said Board and announced by it in the notice accompanying the sending out of the ballots and envelopes, said date to be not later than four days after the date fixed by the Board for the closing of the balloting. The canvassing shall be made publicly and any licensed dentists may be present. The counting of ballots shall be conducted as follows: The envelopes shall be displayed to the persons present and an opportunity shall be given to any person present to challenge the qualification of the voter whose signature appears on the envelope or to challenge the validity of the envelope. Any envelope (with enclosed ballot) challenged shall be set aside, and the challenge shall be heard later or at that time by said Board. After the envelopes have been so exhibited, those not challenged shall be opened and the ballots extracted therefrom, insofar as practicable without showing the marking on the ballots, and there shall be a final and complete separation of each envelope and its enclosed ballot. Thereafter each ballot shall be presented for counting, shall be displayed and, if not challenged, shall be counted. No ballot shall be valid if it is marked for more nominees than there are positions to be filled in that election: provided, that no ballot shall be rejected for any technical error unless it is impossible to determine the voter's choices or choice from the ballot. The counting of the ballots shall be continued until completed. During the counting, challenge may be made to any ballot on the grounds only of defects appearing on the face of the ballot. The said Board may decide the challenge immediately when it is made or it may put aside the ballot and determine the challenge upon the conclusion of the counting of the ballots.

(9) a. Where there is more than one nominee eligible for election to a single seat:

1. The nominee receiving a majority of the votes cast shall be declared elected.

2. In the event that no nominee receives a majority, a second election shall be conducted between the two nominees who receive the highest number of votes.

b. Where there are more than two nominees eligible for election to either of two seats at issue in the same election:

1. A majority shall be any excess of the sum ascertained by dividing the total number of votes cast for all nominees by four.

2. In the event that more than two nominees receive a majority of the votes cast, the two receiving the highest number of votes shall be declared elected.

3. In the event that only one of the nominees receives a majority, he shall be declared elected and the Board of Dental Examiners shall thereupon order a second election to be conducted between the two nominees receiving the next to highest number of votes.

4. In the event that no nominee receives a majority, a second election shall be conducted between the four candidates receiving the highest number of votes. At such second election, the two nominees receiving the highest number of votes shall be declared elected.

c. In any election, if there is a tie between candidates, the tie shall be resolved by the vote of the Board of Dental Examiners, provided that if a

member of that Board is one of the candidates in the tie, he may not participate in such vote.

(10) In the event there shall be required a second election, there shall be followed the same procedure as outlined in the paragraphs above subject to the same limitations and requirements: provided, that if the second election is between four candidates, then the two receiving the highest number of votes shall be declared elected.

(11) In the case of the death or withdrawal of a candidate prior to the closing of the polls in any election, he shall be eliminated from the contest and any votes cast for him shall be disregarded. If, at any time after the closing of the period for nominations because of lack of plural or proper nominations or death, or withdrawal, or disqualification or any other reason, there shall be (i) only two candidates for two positions, they shall be declared elected by the Board of Dental Elections, or (ii) only one candidate for one position, he shall be declared elected by the Board of Dental Elections, or (iii) no candidate for two positions, the two positions shall be filled by the Board of Dental Examiners, or (iv) no candidate for one position, the position shall be filled by the Board of Dental Examiners, or (v) one candidate for two positions, the one candidate shall be declared elected by the Board of Dental Elections and one qualified dentist shall be elected to the other position by the Board of Dental Examiners. In the event of the death or withdrawal of a candidate after election but before taking office, the position to which he was elected shall be filled by the Board of Dental Examiners. In the event of the death or resignation of a member of the Board of Dental Examiners, after taking office,

his position shall be filled for the unexpired term by the Board of Dental Examiners.

(12) An official list of licensed dentists shall be kept at an office of the Board of Dental Elections and shall be open to the inspection of any person at all times. Copies may be made by any licensed dentist. As soon as the voting in any election begins a list of the licensed dentists shall be posted in such office of said Board and indication by mark or otherwise shall be made on that list to show whether a ballot enclosing envelope has been returned.

(13) All envelopes enclosing ballots and all ballots shall be preserved and held separately by the Board of Dental Elections for a period of six months following the close of an election.

(14) From any decision of the Board of Dental Elections relative to the conduct of such elections, appeal may be taken to the courts in the manner otherwise provided by Chapter 150B of the General Statutes of North Carolina.

(15) The Board of Dental Elections is authorized to make rules and regulations relative to the conduct of these elections, provided same are not in conflict with the provisions of this section and provided that notice shall be given to all licensed dentists residing in North Carolina.

46. State Board of Environmental Health Specialist Examiners

§ 90A-55. State Board of Environmental Health Specialist Examiners; appointment and term of office.

(a) Board Membership.—The Board shall consist of 12 members who shall serve staggered terms: the

Secretary of Environment and Natural Resources, or the Secretary's duly authorized representative, one public spirited citizen, one environmental sanitation educator from an accredited college or university, one local health director, a representative of the Division of Environmental Health of the Department of Environment and Natural Resources, and seven practicing environmental health specialists who qualify by education and experience for registration under this Article, six of whom shall represent the Western, Piedmont, and Eastern Regions of the State as described more specifically in the rules adopted by the Board.

(b) Term of Office.—Each member of the State Board of Environmental Health Specialist Examiners shall be appointed by the Governor for a term of four years. As the term of each current member expires, the Governor shall appoint a successor in accordance with the provisions of this section. If a vacancy occurs on the Board for any other reason than the expiration of a member's term, the Governor shall appoint a successor for the remainder of the unexpired term. No person shall serve as a member of the Board for more than two consecutive four year terms.

47. State Board of Examiners for Engineers and Surveyors

§ 89C-4. State Board of Examiners for Engineers and Surveyors; appointment; terms.

A State Board of Examiners for Engineers and Surveyors, whose duty it is to administer the provisions of this Chapter, is created. The Board shall consist of four licensed professional engineers, three licensed professional land surveyors and two

public members, who are neither professional engineers nor professional land surveyors. Of the land surveyor members, one and only one may hold dual licenses as a professional land surveyor and professional engineer. All of the members shall be appointed by the Governor. Appointments of the engineer and land surveyor members shall preferably, but not necessarily, be made from a list of nominees submitted by the professional societies for engineers and land surveyors in this State. Each member of the Board shall receive a certificate of appointment from the Governor and shall file with the Secretary of State a written oath or affirmation for the faithful discharge of the duties.

Members of the Board serve for staggered five year terms, and no member may be appointed for more than two full terms. Members serve until the expiration of their respective terms and until their respective successors are appointed. If a vacancy occurs during a term, the Governor shall appoint a successor from the same classification as the person causing the vacancy to serve for the remainder of the unexpired term. If the vacancy is not filled within 90 days after it occurs, the Board may appoint a provisional member to serve until the appointment by the Governor becomes effective. The provisional member during his tenure has all the powers and duties of a regular member. (1921, c. 1, ss. 3 6; C.S., ss. 6055(d) 6055(g); 1951, c. 1084, s. 1; 1957, c. 1060, s. 1; 1963, c. 843; 1965, c. 940; 1975, c. 681, s. 1; 1979, c. 819, s. 1; 1998 118, s. 3.)

48. State Board of Examiners of Electrical Contractors

§ 87-39. Board of Examiners; appointment; terms; chairman; meetings; quorum; principal office; compensation; oath.

(a) The State Board of Examiners of Electrical Contractors shall continue as the State agency responsible for the licensing of persons engaging in electrical contracting within this State, and shall consist of one member from the North Carolina Department of Insurance to be designated by the Commissioner of Insurance; one member who has satisfied the requirements for an unlimited license as defined in G.S. 87 43.3 and who is a representative of the North Carolina Association of Electrical Contractors to be designated by the governing body of that organization; and five members to be appointed by the Governor: one from the faculty of The Greater University of North Carolina who teaches or does research in the field of electrical engineering, one who is serving as a chief electrical inspector of a municipality or county in North Carolina, one who has satisfied the requirements for an unlimited license as defined in G.S. 87 43.3 and who is a representative of the Carolinas Electrical Contractors Association operating a sole proprietorship, partnership or corporation located in North Carolina which is actively engaged in the business of electrical contracting, and two who have no ties with the construction industry and who represent the interest of the public at large.

49. State Board of Examiners of Fee-Based Practicing Pastoral Counselors

§ 90-385. Creation of Board; appointment and removal of members; terms and compensation; powers.

(a) The North Carolina State Board of Examiners of Fee Based Practicing Pastoral Counselors is created. The Board shall consist of seven members as follows:

(1) Three members appointed by the Governor, two of whom shall be certified fee based practicing pastoral counselors and one of whom shall be a certified fee based pastoral counseling associate.

(2) Two members appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives, one of whom shall be a certified fee based practicing pastoral counselor and one of whom shall be a public member who has no direct affiliation with the practice of pastoral counseling.

(3) Two members appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate, one of whom shall be a certified fee based practicing pastoral counselor and one of whom shall be a public member who has no direct affiliation with the practice of pastoral counseling.

Initial appointees shall be persons who meet the education and experience requirements for certification under this Article and shall be deemed certified upon appointment. In making appointments, consideration shall be given to adequate representation from the various fields and

areas of the practice of pastoral counseling. Legislative appointments shall be made in accordance with G.S. 120-121.

50. State Board of Examiners of Plumbing, Heating, and Fire Sprinkler

§ 87-16. Board of Examiners; appointment; term of office.

There is created the State Board of Examiners of Plumbing, Heating, and Fire Sprinkler Contractors consisting of seven members appointed by the Governor: one member from a school of engineering of the Greater University of North Carolina, one member who is a plumbing or mechanical inspector from a city in North Carolina, one licensed air conditioning contractor, one licensed plumbing contractor, one licensed heating contractor, one licensed fire sprinkler contractor, and one person who has no tie with the construction industry to represent the interests of the public at large. Members serve for terms of seven years, with the term of one member expiring each year. The term of the member initially appointed to fill the position of licensed fire sprinkler contractor shall commence April 25, 1991. No member appointed after June 7, 1979, shall serve more than one complete consecutive term. Vacancies occurring during a term are filled by appointment of the Governor for the remainder of the unexpired term. (1931, c. 52, s. 1; 1939, c. 224, s. 1; 1971, c. 768, s. 1; 1973, c. 476, s. 128; 1979, c. 834, s. 1; 1989 (Reg. Sess., 1990), c. 842, s. 1; c. 978, s. 1.)

51. State Board of Opticians

§ 90-238. North Carolina State Board of Opticians created; appointment and qualification of members.

The North Carolina State Board of Opticians is created. The Board's duty is to carry out the purposes and enforce the provisions of this Article. The Board shall consist of seven members appointed by the Governor as follows:

(1) Five licensed dispensing opticians, each of whom shall serve three year terms;

(2) Two residents of North Carolina who are not licensed as dispensing opticians, physicians, or optometrists, who shall serve three year terms.

Each member of the Board shall serve until the member's successor is appointed and qualifies. No person shall serve on this Board for more than two complete consecutive terms. Before beginning office, each member of the Board shall take all oaths prescribed for other State officers in the manner provided by law, which oaths shall be filed in the office of the Secretary of State. The Governor may remove any member of the Board for good cause shown, may appoint members to fill unexpired terms, and must make optician appointments from a list of three nominees for each vacancy submitted by the Board as a result of an election conducted by the Board each year and open to all licensees. In naming candidates for election, the Board must ensure that its candidates reflect the composition of the State with regards to gender, ethnic, racial, and age composition. If the Board fails to fulfill its requirements under this section, the Governor may appoint a licensed optician to fill a vacancy on the

Board. (1951, c. 1089, s. 5; 1979, c. 533; 1981, c. 600, s. 3; 1997 424, s. 7; 2007 525, s. 13.)

52. State Board of Refrigeration Examiners

§ 87-52. State Board of Refrigeration Examiners; appointment; term of office.

For the purpose of carrying out the provisions of this Article, the State Board of Refrigeration Examiners is created, consisting of seven members appointed by the Governor to serve seven year staggered terms. The Board shall consist of one member who is a wholesaler or a manufacturer of refrigeration equipment; one member from an engineering school of The University of North Carolina, one member from the Division of Public Health of The University of North Carolina, two licensed refrigeration contractors, one member who has no ties with the construction industry to represent the interest of the public at large, and one member with an engineering background in refrigeration. The term of office of one member shall expire each year. Vacancies occurring during a term shall be filled by appointment of the Governor for the unexpired term. Whenever the term "Board" is used in this Article, it means the State Board of Refrigeration Examiners. No Board member shall serve more than one complete consecutive term. (1955, c. 912, s. 1; 1959, c. 1206, s. 2; 1973, c. 476, s. 128; 1979, c. 712, s. 1; 1995, c. 376, s. 1.)

53. State Board of Registration for Foresters

§ 89B-3. State Board of Registration for Foresters; appointment of members; terms.

(a) A State Board of Registration for Foresters is created to administer the provisions of this Chapter. The Board shall have five members as follows:

(1) Four duly practicing registered foresters, at least three of whom hold a bachelors or higher degree from an accredited forestry school, and

(2) One public member.

Each member shall be appointed by the Governor for a three year term. No member may serve more than two complete consecutive terms.

(b) Each member of the Board shall be a citizen of the United States and a resident of North Carolina.

(c) Vacancies in the membership of the Board shall be filled by appointment by the Governor for the unexpired term.

(d) The Board shall elect annually the following officers: a chairman, and a vice chairman, who shall be members of the Board, and a secretary who may be a member of the Board. A quorum of the Board shall consist of not less than three voting members of the Board. (1975, c. 531, s. 3; 1983, c. 103, s. 1; 1998 157, s. 1.)

54. State Hearing Aid Dealers and Fitters Board

§ 93D-3. North Carolina State Hearing Aid Dealers and Fitters Board; composition, organization, duties and compensation.

(a) There is hereby created a board whose duty it shall be to carry out the purposes and enforce the provisions of this Chapter, and which shall be known

as the "North Carolina State Hearing Aid Dealers and Fitters Board." The Board shall be composed of seven members. Four members who have been actively engaged in the fitting and selling of hearing aids for three years shall be appointed by the Governor. These initial appointments are for the following terms: one for one year, one for two years, one for three years and one for four years. All appointments made on or after July 1, 1981, shall be for terms of three years.

One member shall be appointed by the Governor who shall be a physician practicing in North Carolina, preferably specializing in the field of otolaryngology. All appointments shall be for terms of three years.

One member shall be appointed by the Governor from a list of two audiologists residing in North Carolina, which list shall be compiled by the North Carolina Speech and Hearing Association. This initial appointment shall be for a term of three years. All appointments made on or after July 1, 1981, shall be for a term of three years.

One member shall be appointed by the Governor to represent the interest of the public at large. This member shall have no ties to the hearing aid business nor shall he be an audiologist. The Governor shall appoint the public member not later than July 1, 1981, to serve a term of three years.

All Board members serving on June 30, 1981, shall be eligible to complete their respective terms. No member appointed to a term on or after July 1, 1981, shall serve more than two complete consecutive terms.

Vacancies on the Board shall be filled by appointment of the Governor. Appointees shall serve

the unexpired term of their predecessor in office and must be appointed from the same category as their predecessor in office. The members of the Board, before entering their duties, shall respectively take all oaths taken and prescribed for other State officers, in the manner provided by law, which oaths shall be filed in the office of the Secretary of State, and the Board shall have a common seal.

55. State Licensing Board for General Contractors

§ 87-2. Licensing Board; organization.

There is created the State Licensing Board for General Contractors consisting of nine members appointed by the Governor for staggered five year terms. Five of the members shall be general contractors, one member shall be a registered engineer who practices structural engineering, and three shall be public members. Of the general contractor members, one shall have as the larger part of his business the construction of highways; one shall have as the larger part of his business the construction of public utilities; one shall have as the larger part of his business the construction of buildings; and two shall have as a larger part of their businesses the construction of residences, one of whom shall be the holder of an unlimited general contractor's license. The public members shall have no ties with the construction industry and shall represent the interests of the public at large. Members shall serve until the expiration of their respective terms and until their successors are appointed and qualified. Vacancies occurring during a term shall be filled by appointment of the Governor for the remainder of the unexpired term. The Governor may remove any member of the Board for

misconduct, incompetency, or neglect of duty. No Board member shall serve more than two complete consecutive terms. (1925, c. 318, s. 2; 1979, c. 713, s. 1; 1991, c. 124, s. 1.)

56. Substance Abuse Professional Practice Board

§ 90-113.30. Declaration of purpose.

The North Carolina Substance Abuse Professional Practice Board, established by G.S. 90 113.32, is recognized as the registering, certifying, and licensing authority for substance abuse professionals described in this Article in order to safeguard the public health, safety, and welfare, to protect the public from being harmed by unqualified persons, to assure the highest degree of professional care and conduct on the part of credentialed substance abuse professionals, to provide for the establishment of standards for the education of credentialed substance abuse professionals, and to ensure the availability of credentialed substance abuse professional services of high quality to persons in need of these services. It is the purpose of this Article to provide for the regulation of Board credentialed persons offering substance abuse counseling services, substance abuse prevention services, or any other substance abuse services for which the Board may grant registration, certification, or licensure. (1993 (Reg. Sess., 1994), c. 685, s. 1; 1997 492, s. 1; 2005 431, s. 1.)

57. Veterinary Medical Board

§ 90-182. North Carolina Veterinary Medical Board; appointment, membership, organization.

(a) In order to properly regulate the practice of veterinary medicine and surgery, there is established a Board to be known as the North Carolina

Veterinary Medical Board which shall consist of eight members.

Five members shall be appointed by the Governor. Four of these members shall have been legal residents of and licensed to practice veterinary medicine in this State for not less than five years preceding their appointment. The other member shall not be licensed or registered under the Article and shall represent the interest of the public at large. Each member appointed by the Governor shall reside in a different congressional district.

The General Assembly, upon the recommendation of the President Pro Tempore of the Senate, shall appoint to the Board one member who shall have been a resident of and licensed to practice veterinary medicine in this State for not less than five years preceding the appointment. The General Assembly, upon the recommendation of the Speaker of the House of Representatives, shall appoint to the Board one member who shall have been a legal resident of and registered as a veterinary technician in this State for not less than five years preceding the appointment.

In addition to the seven members appointed as provided above, the Commissioner of Agriculture shall biennially appoint to the Board the State Veterinarian or another veterinarian from a staff of a North Carolina department or institution. This member shall have been a legal resident of and licensed to practice veterinary medicine in North Carolina for not less than five years preceding his appointment.

Every member shall, within 30 days after notice of appointment, appear before any person authorized to

administer the oath of office and take an oath to faithfully discharge the duties of the office.

PETITIONER'S BRIEF

No. 13-534

In the Supreme Court of the United States

THE NORTH CAROLINA STATE BOARD
OF DENTAL EXAMINERS,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether, for purposes of the state-action exemption from federal antitrust law, an official state regulatory board created by state law may properly be treated as a "private" actor simply because, pursuant to state law, a majority of the board's members are also market participants who are elected to their official positions by other market participants.

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BRIEF FOR PETITIONER

The North Carolina State Board of Dental Examiners ("the Board") respectfully submits this brief arguing for reversal of the judgment below.

OPINIONS

The opinion of the Court of Appeals for the Fourth Circuit (Pet.App. 1a) is reported at 717 F.3d 359. The opinion of the Federal Trade Commission ("FTC") entering summary decision against the Board on the issue of state-action antitrust immunity (Pet.App. 34a) is reported at 151 F.T.C. 607. The FTC's final opinion and order against the Board (Pet.App. 69a, 143a) are not yet reported, but are available at 2011 WL 6229615.

JURISDICTION

The Fourth Circuit entered judgment on May 31, 2013, and denied rehearing on July 30, 2013. The petition for writ of certiorari was filed on October 25, 2013, and granted on March 3, 2014. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The appendix hereto reproduces in relevant part the Sherman Act and the FTC Act, 15 U.S.C. §§ 1, 45, as well as North Carolina laws that establish and govern the Board, *see generally*, N.C. Gen. Stat. §§ 90-22 *et seq.*, 93B-1 *et seq.*

STATEMENT OF THE CASE

This case presents a stark departure from the state-action antitrust immunity doctrine applied in *Parker v. Brown*, 317 U.S. 341 (1943), and its progeny. Breaking from 70 years of precedent, the FTC and the Fourth Circuit held that a *bona fide* state regulatory board must be treated as a "private" actor simply because, under state law, a majority of the board's members are also market participants who are elected to their official positions by other market participants.

A. Legal Background

1. The state-action doctrine provides that "the federal antitrust laws" "should not be read to bar States from imposing market restraints 'as an act of government.'" *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1010 (2013) (quoting *Parker*, 317 U.S. at 352). Allowing States to undertake "anticompetitive actions ... in their governmental capacities as sovereign regulators" reflects "our national commitment to federalism." *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 374 (1991).

Under this doctrine, "when a state legislature adopts legislation" or "a state supreme court[ ] act[s] legislatively," their "actions constitute those of the State ... and *ipso facto* are exempt from the operation of the antitrust laws." *Hoover v. Ronwin*, 466 U.S. 558, 567-68 (1984); *see also id.* at 568 n.17 (reserving whether a state Governor's actions are ever likewise *ipso facto* exempt). A "[c]loser analysis is required," though, "when the activity at issue is not directly that of the legislature or supreme court, ... but is carried out by others." *Id.* at 568.

For example, private actors are exempt from federal antitrust law when two standards are satisfied: their conduct must (1) be authorized by a "clearly articulated ... state policy" to displace competition, and (2) be "actively supervised" by state officials. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

In contrast, municipal actors need only satisfy the first of those standards: so long as a "municipality act[s] pursuant to a clearly articulated state policy[,] ... there is no need to require the State to supervise actively the municipality's execution of what is a properly delegated function." *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46-47 (1985). In *Hallie*, this Court also noted, without deciding, that, "[i]n cases in which the actor is a state agency, it is likely that active state supervision would also not be required." *Id.* at 46 n.10.

2. Until the decision below, "the courts uniformly agree[d]"—consistent with both *Hallie* and other decisions of this Court—that active supervision is not required "for the 'public' departments and agencies of the state itself." *See* Phillip Areeda & Herbert Hovenkamp, 1A *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 226b, at 166 (3d ed. 2006). Moreover, and of direct relevance here, courts treated state agencies as "public" actors who were not subject to the active-supervision standard even where their officers were also market participants whose selection for office was caused by other market participants.

For example, the Fifth Circuit held that a state agency regulating accountants was "exempt[ ] from the active-supervision prong" given that "the public

nature of [its] actions" rendered it "functionally similar to a municipality," "[d]espite the fact" that the agency was "composed entirely of [accountants] who compete in the profession they regulate," and who were chosen for office by the Governor from an exclusive "slate of candidates proposed by" the accountants' own professional association. *See Earles v. State Bd. of Certified Pub. Accountants of La.*, 139 F.3d 1033, 1035, 1041-42 (5th Cir. 1998). Likewise, the Ninth Circuit held that a state agency regulating lawyers "need not satisfy the 'active supervision' requirement" given that it was "a public body[ ] akin to a municipality," notwithstanding that a super-majority of the agency's board of governors were practicing lawyers who were elected to office by their peers. *See Hass v. Oregon State Bar*, 883 F.2d 1453, 1460-61 & n.3 (9th Cir. 1989). And, while some have read a few cases to have "suggested ... in dicta" that active supervision might be required for state agencies whose officers are also market participants, there was no "circuit decision squarely [so] holding" prior to this case, as even academic supporters of the FTC's position acknowledge. *See* Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. Pa. L. Rev. 1093, 1125 (2014).

The absence of any such judicial decision is noteworthy background here because it demonstrates the novelty and disruptiveness of the decision below. Occupational licensing boards are "ubiquitous" in this country—regulating professions as diverse as "lawyers, doctors, ... floral designers, ... and taxidermists"—and such "boards are typically dominated by active members of the very profession that they are tasked with regulating." *See, e.g., id.*

at 1102-03 (citing sources). Yet, in light of "*Parker* and its progeny," including cases "such as *Hass* and *Earles*," few antitrust plaintiffs have even tried to "pursue [active-supervision] suits" against such boards, and the States have continued to use such boards in reliance on "the balance between state and federal power [that has been] struck" under the case law. *See id.* at 1125-26, 1136.

3. In July 2001, however, the FTC's Office of Policy Planning convened a "State Action Task Force." *See* FTC Office of Policy Planning, *Report of the State Action Task Force* (Sept. 2003).[1] As the FTC's Chairman explained, the Task Force was created "[t]o address the concern that some courts ha[d] interpreted the state action doctrine too expansively." *See* Timothy J. Muris, *Clarifying the State Action and Noerr Exemptions*, 27 Harv. J.L. & Pub. Pol'y 443, 447 (2004).

The Task Force specifically criticized *Earles*, *Hass*, and similar cases. *See Report*, *supra*, at 38-39. It recommended that the FTC advance a new and different "approach[ ]," pursuant to which active supervision would be required for "any entity consisting in whole or in part of market participants," regardless of the entity's "governmental attributes." *See id.* at 55-56.

As demonstrated below, that Task Force recommendation is essentially the position that the FTC has now adopted, after it created the "opportunity" to do so (*see* Pet.App. 34a) by initiating this test case against the Board.

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[1] *Available at* http://www.ftc.gov/policy/policy-actions/advocacy-filings/2003/09/report-state-action-task-force.

B. Factual And Procedural Background

1. "The North Carolina State Board of Dental Examiners ... [is] the agency of the State for the regulation of the practice of dentistry." N.C. Gen. Stat. § 90-22(b). The State Legislature has decided that the Board's membership shall consist of six practicing dentists elected by the State's licensed dentists, as well as one practicing hygienist elected by the State's licensed hygienists and one consumer member appointed by the Governor. *Id.*

a. As a state agency, the Board has traditional governmental powers that private actors typically do not have: It has quasi-legislative power "to enact rules and regulations governing the practice of dentistry," backed by criminal penalties. *Id.* § 90-48. It has quasi-executive power to issue licenses for dentistry, *id.* § 90-30(a), and to investigate "any practices committed in th[e] State that might violate" the laws that it enforces, *id.* § 90-41(d). And it has quasi-judicial power to "issue subpoenas requiring the attendance of persons and the production of papers and records ... in any hearing, investigation or proceeding." *Id.* § 90-27.

Likewise, as a state agency, the Board has traditional governmental duties that private actors typically do not have: Its members must swear an oath of allegiance to the State, *id.* § 11-7, and must comply with the State's administrative procedure act as well as other restrictions concerning ethics, public records, and open meetings, *id.* § 93B-5(g). Moreover, the Board's conduct is subject to scrutiny by all three branches of state government. A legislative committee has oversight "to determine if [the Board is] operating in accordance with statutory

requirements." *Id.* § 120-70.101(3a). Executive-branch officials receive annual reports summarizing the Board's regulatory activities. *Id.* § 93B-2(a). And judicial review is available to ensure that the Board's actions comply with state law. *See, e.g., Charlotte-Mecklenburg Hosp. Auth. v. North Carolina Indus. Comm'n*, 443 S.E.2d 716, 721 (N.C. 1994).

b. One of the state laws that the Board is charged with enforcing is the legislative ban on "practic[ing] dentistry" without a license. N.C. Gen. Stat. § 90-40. As relevant here, "[a] person shall be deemed to be practicing dentistry" if he "[r]emoves stains, accretions or deposits from the human teeth" or "[t]akes or makes an impression of the human teeth, gums or jaws." *Id.* § 90-29(b)(2),(b)(7). If the Board concludes that these provisions have been violated, it may refer the matter for criminal prosecution, *id.* § 90-40, or itself bring a civil suit for injunctive relief, *id.* § 90-40.1(a).

In 2003, the Board started receiving complaints that non-dentists were practicing dentistry by providing "teeth whitening" services. Pet.App. 75a. As relevant here, such services entailed "the application of some form of peroxide to the teeth using a gel or strip," thereby "trigger[ing] a chemical reaction that results in whiter teeth." *Id.* 73a.

After investigation and discussion, the Board in 2006 enforced the state-law ban on unlicensed dental practice by sending "cease and desist letters" on its official letterhead to non-dentist teeth whitening providers. *Id.* 76a. It also sent letters to shopping mall operators, requesting that they stop leasing kiosks to non-dentist teeth whiteners. *Id.* 77a. It similarly persuaded the North Carolina Board of

Cosmetic Art Examiners to notify its licensed salons and spas that teeth whitening required a dental license. *Id.* 77a-78a. The Board's enforcement actions caused some non-dentists to stop providing teeth whitening services. *Id.*

2. In response to these events, the FTC issued an administrative complaint under the FTC Act against the Board. *Id.* 78a. The complaint charged that the Board had violated the FTC Act by violating the Sherman Act. *Id.* 86a-87a. It alleged that, through the "cease and desist letters" and other official communications discussed above, the Board had engaged in concerted action with the intent and effect of excluding competition from non-dentist providers of teeth whitening services. *Id.* 78a-79a.

a. The Board moved to dismiss under the state-action antitrust doctrine, and Complaint Counsel cross-moved for partial summary decision. *Id.* 36a. Pursuing the path previously recommended by the State Action Task Force, the FTC denied the Board's invocation of immunity. *Id.* 68a.

At the outset, the FTC expressly assumed that the Board's conduct was authorized by a "clear[ly] articulat[ed]" state policy to displace competition. *Id.* 47a n.8. The FTC declined to consider Complaint Counsel's contrary position, which was based on arguments that the anticompetitive state-law ban on unlicensed dental practice did not cover the specific teeth whitening services at issue and that the Board was not authorized to enforce that ban in the specific manner that it had. *See id.* 48a.

But the FTC then broke new ground by ruling that the Board's conduct also must be "'actively supervised' by the State itself," notwithstanding that

the Board is a state agency rather than a private actor. *See id.* 46a-47a. The FTC held that "a state regulatory body that is controlled by participants in the very industry it purports to regulate" must be actively supervised by a state entity that is not so constituted. *See id.* 58a. The FTC reasoned that, "when determining whether the state's active supervision is required, the operative factor is a tribunal's degree of confidence that the entity's decision-making process is sufficiently independent from the interests of those being regulated." *Id.* 49a. That factor is key, the FTC asserted, because active supervision addresses the "danger" that the entity's decisionmakers are "acting to further [their] own interests, rather than the governmental interests of the State." *Id.* 49a-50a. The FTC also noted that its decision was "reinforced" by the fact that the Board's members "are elected directly by ... other licensed dentists" in the state, *id.* 59a; but that specific selection method was not necessary to the decision, which treated as sufficient that a majority of the Board's members are practicing dentists. *See id.* 35a-36a, 58a, 68a, 81a.

Finally, the FTC concluded that no other state entity had actively supervised the Board's official communications about teeth whitening. *Id.* 68a. The FTC reasoned that, while the Board was subject to "generic oversight" by various state actors, none of them had specifically "reviewed or approved" the Board's challenged conduct. *See id.* 61a-68a.

b. After a merits hearing, the FTC entered a final opinion and order against the Board. *Id.* 71a.

The FTC first ruled that the Board was legally capable of engaging in concerted action to restrain

trade because its members had separate economic interests, *id.* 93a-100a, and the FTC further found that the Board's members in fact had conspired with each other by collectively approving the Board's official actions regarding teeth whitening services, *id.* 100a-104a. The FTC then held that the Board had unreasonably restrained trade by using its official communications to deter teeth whitening by non-dentists. *Id.* 104a. In so holding, the FTC repeatedly noted that the Board's communications had the tendency and effect of excluding competition due to the Board's official status and apparent authority. *See id.* 107a, 112a-113a, 128a-129a. And the FTC rejected the Board's asserted procompetitive justifications, primarily on the ground that "public safety concerns" are not "cognizable justifications for restraints on competition" under federal antitrust law. *See id.* 114a-125a.

The FTC's final order prohibits the Board from directing non-dentists to cease their teeth whitening services and also from instructing non-dentists or their business partners that unlicensed teeth whitening is illegal. *See id.* 145a-147a. It further compels the Board to provide corrective notifications and to follow new reporting and inspection requirements. *See id.* 148a-151a, 153a-155a.

The FTC's final order disclaims any attempt to interfere with the Board's authority to investigate unlicensed dental practice or to initiate judicial proceedings. *See id.* 147a. The order also permits the Board to communicate its belief that unlicensed teeth whitening is illegal as well as its *bona fide* intent to initiate judicial proceedings, so long as the communications include an FTC-drafted disclosure

emphasizing that the Board itself lacks the authority to declare unlicensed teeth whitening unlawful or to enjoin that practice. *See id.* 147a-148a, 152a. These provisos in the order, however, do not purport to exempt any such compliant conduct from the FTC's state-action decision or to exempt such conduct from federal antitrust scrutiny (absent active state supervision) if it is later challenged by the FTC or private plaintiffs. *See id.* 35a-36a, 81a.

3. The Board filed a petition for review. *Id.* 4a. The Fourth Circuit denied the petition. *Id.*

As relevant here, the Fourth Circuit "agree[d] with the FTC" that state agencies must satisfy the active-supervision standard where "a decisive coalition" of the agency "is made up of participants in the regulated market[,] who are chosen by and accountable to their fellow market participants." *Id.* 14a. Like the FTC, the Fourth Circuit reasoned that the State must "exercise[ ] sufficient independent judgment and control" over such state agencies in order to address the "danger" that they are acting "to benefit [their] own membership," even where their conduct is authorized by a clearly articulated anti-competitive state policy. *See id.* 15a. In sum, the court held that, "when a state agency is operated by market participants who are elected by other market participants, it is a 'private' actor" for purposes of the state-action exemption. *Id.* 17a.

Judge Keenan wrote a brief concurrence, which emphasized that this case involved a state agency whose market-participant members were "elected by other private participants in the market," rather than "appointed or elected by state government officials." *Id.* 29a-31a.

SUMMARY OF ARGUMENT

I. The state-action doctrine of *Parker v. Brown*, *supra*, provides that sovereign state regulatory action falls outside the scope of federal antitrust law. The Board here is entitled to invoke that state-action immunity on the same terms as all other *bona fide* public agencies, regardless of the fact that the Board's public officials are also market participants.

A. Under *Parker* and its progeny, antitrust immunity is grounded in a basic presumption of federalism: Congress did not intend to restrain a State or its officers or agents from implementing an anticompetitive regulatory regime adopted by the State's sovereign lawmakers. Thus, when public actors assert state-action immunity, they must show that they are enforcing an anticompetitive policy that has been "clearly articulated" by a state lawmaking body. But they need not further show, as private actors must, that their clearly authorized anticompetitive conduct was "actively supervised" by another state entity. That additional showing is necessary for private actors only to ensure that the State is truly adopting their anticompetitive conduct as its own regulatory action, rather than just attempting by fiat to exempt their private business activities from federal antitrust law. This concern is entirely inapposite for *bona fide* public agencies, which are the State's own regulatory arms, not mere shams for immunizing private actors. Indeed, in *City of Columbia v. Omni Outdoor Advertising, Inc.*, *supra*, this Court held that public officials may invoke state-action immunity even where they have misapplied an anticompetitive state law or have conspired to apply that law solely for private benefit.

In sum, the governing legal rule under *Parker* and its progeny—which was universally followed until the decision below—is that a *bona fide* state agency is entitled to state-action immunity so long as it is enforcing a clearly articulated anticompetitive state policy, whether or not its conduct is actively supervised by any other state entity.

B. The rule that active supervision is not required for state agencies fully applies when, under state law, a majority of an agency's public officials are also market participants. In fact, *Parker* itself granted immunity to an agency that was so constituted, without any active supervision by another state entity that was not so constituted. Moreover, several circuit courts have expressly held likewise, and no court in the 70 years since *Parker* has ever held otherwise besides the decision below, even though there are countless state agencies operated by public officials who are also market participants. Most fundamentally, all of the principles that inform and justify the general rule that state agencies need not be actively supervised are specifically applicable to those agencies whose public officials are also market participants.

First, a basic presumption of federalism is that Congress did not intend to interfere with the States' sovereign choices about staffing and structuring the agencies that implement their anticompetitive regulatory laws. In particular, States should be free to make the policy decision that the public officials who run their regulatory agencies will be market participants (*e.g.*, because they possess specialized knowledge and expertise), and that agencies run by such officials will not be actively supervised by any

other state entity (*e.g.*, because such review would be inefficient and ineffective). Denying immunity to such state agencies because state legislatures made these choices would turn federalism on its head.

Second, a state agency's enforcement of a clearly articulated anticompetitive state policy necessarily has been adopted by the State as its own regulatory conduct, even where the agency's officials are also market participants who are not actively supervised. Unlike private actors whom the State simply purports to allow to make anticompetitive business decisions despite federal law, public officials who are also market participants are executing state regulatory power that federal law does not purport to restrain. There is no realistic danger that a State is merely engaged in a pretextual sham to immunize private business activities when it chooses to use market-participant officials to operate *bona fide* regulatory agencies that are charged with state-law powers and duties that public actors traditionally have and that private actors typically do not have.

Third, the regulatory actions of public officials do not lose their public character just because the officials also may have private interests in those actions. *Omni* rejected an exception to state-action immunity that would have looked behind public actions in order to determine whether they were part of a "conspiracy" with private actors. Indeed, *Omni* granted immunity even though public officials were allegedly bribed by a private monopolist to enact favorable zoning ordinances, which was a far more direct private benefit than the indirect private benefit that may be received by officials who are also market participants.

II. In breaking from the judicial consensus that had developed over 70 years under *Parker* and its progeny, the FTC and the Fourth Circuit adopted a radical new approach. Those tribunals began with the premise that the function of the active-supervision standard is to address the "danger" that the entity involved is "acting to further its own interests" rather than the State's interests, and they ended with the conclusion that active supervision is required where a state agency is not "sufficiently independent" from the interests of those being regulated. This two-step theory—in essence, a "risk of self-interest" rationale—is fundamentally flawed.

A. The "risk of self-interest" rationale conflicts with the precedents and principles that underlie the general rule that state agencies are not required to be actively supervised by another state entity.

First, the rationale's premise is wrong, because the active-supervision standard has nothing to do with the "danger" that the State's interests are not being furthered. The clear-articulation standard and state administrative law fully protect the State from any such danger; the active-supervision standard instead prevents the State from exempting private actors' business decisions from federal law—a concern that is inapplicable to the regulatory decisions of the State's own *bona fide* officials.

Second, the rationale's conclusion is wrong too, because antitrust immunity does not depend on public officials being "sufficiently independent" from private actors. This point is dictated by *Omni*, which specifically granted immunity even though public officials allegedly had been bribed by a private actor, and which generally rejected all attempts to look

behind the public nature of the officials' actions due to their alleged "conspiracy" with that private actor.

Third, the rationale contradicts the core precepts of federalism that the state-action doctrine seeks to respect. It improperly second-guesses the States' sovereign policy choices concerning whether and how to bear the risk that their officials may have actual or potential conflicts of interest.

B. No decision of this Court supports the "risk of self-interest" rationale. As for the two decisions that the FTC and the Fourth Circuit principally relied upon, one involved a public agency that acted without a clearly articulated state policy to displace competition, and the other involved private actors who were not public officials at all. Those decisions did not in any way suggest that public officials enforcing a clearly articulated anticompetitive state policy must be actively supervised simply because their official regulatory actions may also affect their private interests.

C. The academic proposals invoked by the FTC and the Fourth Circuit cannot justify their position. Those proposals conflict with this Court's precedents and lack widespread approval among scholars.

III. Just as it does not matter that a state agency's officials are market participants, it also does not matter that those officials are elected to office by other market participants. For all the reasons discussed above, the particular state-law method of selecting a State's market-participant officials is completely irrelevant under the state-action doctrine.

ARGUMENT

It is undisputed here that the Board is a *bona fide* agency of the State of North Carolina, charged with regulating the practice of dentistry pursuant to state-law powers and state-law duties that public entities traditionally have and that private actors typically do not have. *See* Pet.App. 40a-41a. It also is not disputed here that the Board's enforcement efforts against non-dentist teeth whiteners were taken pursuant to a clearly articulated state policy to displace competition in dentistry. *See id.* 47a n.8.

Those undisputed points should have sufficed, under long-established precedent, to render the Board's conduct exempt from federal antitrust law. But the FTC and the Fourth Circuit starkly broke from precedent, holding instead that the Board must be treated as a "private" actor who must additionally show that its conduct was actively supervised by another state entity, simply because state law requires that a majority of the Board's members also must be practicing dentists who are elected to their official positions by other practicing dentists.

This novel and disruptive holding should be rejected. Most importantly, the holding grossly disrespects the basic principles of federalism that the state-action antitrust doctrine seeks to preserve, because it conditions the States' sovereign right to enforce anticompetitive state laws on how the States exercise their equally sovereign right to staff and structure the agencies that enforce those laws. Moreover, the holding radically undermines the fundamental distinction between public and private conduct that this Court's state-action antitrust decisions have consistently maintained.

I. THE ACTIVE-SUPERVISION STANDARD FOR STATE-ACTION ANTITRUST IMMUNITY DOES NOT APPLY TO STATE AGENCIES, INCLUDING AGENCIES WHOSE OFFICIALS ARE ALSO MARKET PARTICIPANTS

Under settled law, in order for a state agency's conduct to be deemed a sovereign act of State government that is not subject to federal antitrust law, the agency needs to show only that it is enforcing a clearly articulated anticompetitive state policy—neither active supervision by another state entity nor any other further inquiry is required or permitted. Importantly, all of the principles that underlie this general legal rule apply fully in the specific factual context of state agencies whose officials are also market participants.

A. A State Agency Is Immune From Federal Antitrust Scrutiny So Long As It Is Enforcing A Clearly Articulated Anticompetitive State Policy

As demonstrated below, three key aspects of this Court's state-action jurisprudence establish the rule that a *bona fide* state agency enforcing a clearly articulated anticompetitive state policy is entitled to state-action immunity without any further showing: (1) the federalism principles that led this Court to recognize the doctrine; (2) the standards that this Court has adopted over time to implement the doctrine; and (3) the factors that this Court has rejected as irrelevant under the doctrine.

1. Respect For Federalism Is Why State Regulatory Action Is Outside The Scope Of Federal Antitrust Law

Parker was the case that first squarely confronted the question whether federal antitrust law applies to anticompetitive state regulatory regimes—there, a state statute authorizing a state agency to restrict competition on terms proposed by market participants for the purpose of maintaining prices. *See* 317 U.S. at 344-47. This Court held that "the Sherman Act did not undertake to prohibit" the States from imposing such a regulatory restraint on competition as "an act of government." *Id.* at 352. In multiple ways, that holding was grounded in the principles of federalism that underlie our "dual system of government." *See id.* at 350-51.

a. *Parker* first emphasized that "nothing in the language of the Sherman Act or in its history ... suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature," and that such "an unexpressed purpose ... is not lightly to be attributed to Congress" because "the states are sovereign." *Id.* That specific interpretation of the antitrust laws' scope reflects a more general federalism-based principle of statutory interpretation, which is that Congress must clearly express its intent to regulate the States directly or otherwise to alter the traditional balance of powers between the sovereigns. *See, e.g., Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989).

Parker also recognized that this respect for state sovereignty does not permit "a state [to] give immunity" to private actors who are violating federal antitrust law merely "by authorizing them to violate

it[ ] or by declaring that their action is lawful." 317 U.S. at 351. Again, that specific interpretation of the antitrust laws' scope reflects a more general precept of federalism, which is that Congress clearly does not intend in the ordinary course to allow States to nullify federal regulation of private actors and thereby invert the Supremacy Clause. *See, e.g.*, *Gonzales v. Raich*, 545 U.S. 1, 29 (2005).

In light of these two principles of federalism, *Parker* construed the federal antitrust laws to draw a fundamental line between "individual and ... state action." 317 U.S. at 352. It held that Congress intended only to prevent anticompetitive conduct "by individuals and corporations" engaged in "business combinations," not to restrain "the state ... in [its] execution of a governmental policy." *See id.* at 351-52. As this Court in *Omni* later put the point, States may not "exempt *private* action from the scope of the Sherman Act," but "*any* action that qualifies as state action is *ipso facto* ... exempt from the operation of the antitrust laws." 499 U.S. at 379 (internal quotation marks omitted).

That different antitrust treatment of private and public conduct reflects this Court's cognizance of "the reality that ... government regulation entails ... value judgment," and that federal antitrust law's one-dimensional protection of competition should not supplant the States' sovereign ability to judge the "public interest" more broadly. *See id.* at 377; *see also Nat'l Soc'y of Prof'l Engr's v. United States*, 435 U.S. 679, 695 (1978) (federal antitrust law typically "precludes inquiry into the question whether [the restrained] competition is good or bad" with respect to public-welfare values like "safety" and "quality").

In sum, "[t]he rationale of *Parker* was that, in light of our national commitment to federalism, the general language of the Sherman Act should not be interpreted to prohibit anticompetitive actions by the States in their governmental capacities as sovereign regulators." *Omni*, 499 U.S. at 374.

b. Turning to the state regulatory scheme before it, *Parker* concluded that the "restrict[ion] [of] competition" to "maintain prices" was, despite the pervasive involvement of market participants, ultimately a "sovereign ... act of government" that was immune from federal antitrust scrutiny. *See* 317 U.S. at 346-47, 352. Although the statute at issue authorized a committee of private producers to formulate a program establishing the exclusive terms on which a commodity could be sold in an area, and further required the consent of a super-majority of the area's producers, the program became effective *only if* "approve[d]" by the State's "Agricultural Prorate Advisory Commission." *Id.* at 346-47.

It thus was "plain that the prorate program ... was never intended to operate by force of individual agreement," but rather "derived its authority and its efficacy from the legislative command of the state." *Id.* at 350. As this Court emphasized, "it is the state, acting through the Commission, which adopts the program and which enforces it ... in the execution of a governmental policy." *Id.* at 352.

Importantly, *Parker* treated "the Commission" as "the state" even though *a super-majority of the Commission's members were also market participants.* In particular, as was clear from the face of the state statute cited by this Court, six of the nine Commission members were required to be

engaged "in the production of agricultural commodities as their principal occupation." *See id.* at 346 (citing 1939 Cal. Stat. ch. 894, § 3, p. 2488); *see also* John Lopatka, *The State of "State Action" Antitrust Immunity: A Progress Report*, 46 La. L. Rev. 941, 948 & n.21 (1986). Moreover, the state statute clearly did not provide for the Commission's members to be actively supervised by any other state entity. *See Parker*, 317 U.S. at 347, 352. These aspects of the statutory scheme did not affect this Court's conclusion as they plainly were not relevant under this Court's rationale (and, indeed, they were not even discussed in this Court's opinion). Regardless, the State was not improperly "giv[ing] immunity" to the "individual agreement" of the market participants who served on the Commission, because they were the State's own "officers," whom Congress did not intend "to restrain" when they were performing "activities directed by its legislature." *See id.* at 350-51.

2. The Clear-Articulation Standard And The Active-Supervision Standard Serve Different Functions, And Only The First Standard Applies To State Agencies

In light of *Parker's* emphasis on sovereignty, this Court has explained that the conduct of a state entity exercising sovereign lawmaking power qualifies as state action that is "*ipso facto*" immune from federal antitrust law without any further inquiry, but that "[c]loser analysis is required" to determine whether the conduct of a non-sovereign actor invoking sovereign authorization also qualifies as immune state action. *See Hoover*, 466 U.S. at 567-68. Specifically, as in *Parker* itself, this Court's

subsequent cases have identified two different questions that are relevant to whether principles of federalism justify treating as immune state action the anticompetitive conduct of an actor who is not itself a sovereign lawmaker: *First*, did the State actually intend to authorize the actor to engage in anticompetitive conduct (or instead has the actor unexpectedly employed general state-law authority in an anticompetitive way)? *Second*, did the State truly adopt the anticompetitive conduct as its own regulatory action (or instead has it just purported to shield private business activities from federal law)?

As synthesized by this Court's decision in *Midcal* and as elaborated in later cases, the doctrinal standard governing the first issue is whether the challenged conduct is authorized by a "clearly articulated ... state policy" to displace competition; and the doctrinal standard governing the second issue is whether the challenged conduct is "actively supervised" by state officials. *See Midcal*, 445 U.S. at 104-05. This Court and the lower courts also have made it clear that, given the distinct roles played by each standard, state agencies need only satisfy the clear-articulation standard, not the active-supervision standard: so long as the State clearly intended for a *bona fide* state regulatory agency to displace competition, the agency's actions are unquestionably the State's own anticompetitive conduct, even without active supervision.

a. Clear Articulation. Because "*Parker* emphasized the role of sovereign *States* in a federal system," *Omni*, 499 U.S. at 370, it is always necessary "to ensure" that "anticompetitive conduct [by] a nonsovereign [actor]" purporting to act with

sovereign authorization was "contemplated by the State" itself, *Hoover*, 466 U.S. at 568-69. Accordingly, such conduct must "derive[ ] ... from [a] legislative command of the state," *Parker*, 317 U.S. at 350, that "clearly articulate[s] ... [a] state policy" to displace competition, *Midcal*, 445 U.S. at 105.

In *Hallie*, this Court held that the clear-articulation standard is satisfied where anti-competitive conduct by a nonsovereign actor was clearly "a foreseeable result" of state law. *See* 471 U.S. at 41-44. A State Legislature does not need to "expressly state" that it intends to authorize anti-competitive conduct. *Id.* at 43-44. So long as its "intent to establish an anticompetitive regulatory program is clear, ... the State's failure to describe the implementation of its policy in detail will not subject the program to the restraints of the federal antitrust laws." *S. Motor Carriers Rate Conf., Inc. v. United States*, 471 U.S. 48, 64-65 (1985).

In *Phoebe Putney*, this Court recently admonished that "the concept of 'foreseeability'" should not be applied "too loosely." 133 S. Ct. at 1012. *Phoebe Putney* explained that cases like *Hallie* had found States to "have foreseen and implicitly endorsed ... anticompetitive effects" only where "the displacement of competition was the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature." *Id.* at 1012-13. By rejecting a "loose[r] application of the clear-articulation test," this Court eliminated any risk that States might "inadvertently authoriz[e] anticompetitive conduct." *Id.* at 1016.

Finally, a State's agencies must satisfy the clear-articulation standard for the same reason as must all

other actors who lack the sovereign power to legislate for the State. "Acting alone," state agencies cannot establish the "policy of the State itself." *See S. Motor Carriers*, 471 U.S. at 62-63. They can only "implement" the policies adopted by "the legislature." *See id.* at 64. Showing clear articulation is what proves that their "state-law authority to act" was intended by the Legislature to include the "delegated authority to ... regulate anticompetitively." *Phoebe Putney*, 133 S. Ct. at 1012.

b. **Active Supervision.** Under *Parker*, showing that the State clearly intended for a non-sovereign actor to engage in anticompetitive conduct is not necessarily sufficient to entitle that actor to the State's antitrust immunity, because a State cannot just "give immunity to those who violate the Sherman Act by authorizing them to violate it." *See Midcal*, 445 U.S. at 105-06 (quoting *Parker*, 317 U.S. at 351). Rather, the State also must "ma[ke] the conduct *its own*." *Patrick v. Burget*, 486 U.S. 94, 105-06 (1988) (emphasis added). As explained further below, where the conduct of a private actor is at issue, showing that the State "actively supervised" the conduct is necessary to prove the State's ownership, *see Midcal*, 445 U.S. at 105-06; but where the conduct of a public municipality or agency is at issue, showing active supervision is unnecessary because the clearly authorized conduct of public actors is inherently the State's own action, *see Hallie*, 471 U.S. at 46-47.

(i) With respect to the "anticompetitive acts of private parties," the active-supervision standard requires that the State "exercise ultimate control" in order to ensure that the conduct "actually further[s]

state regulatory policies" in a way that is "fairly attributable to the State." *See Patrick*, 486 U.S. at 100-01. "The mere presence of some state involvement or monitoring does not suffice," because that provides "no realistic assurance" that the State authorized the "private party's anticompetitive conduct" to "promote[ ] state policy, rather than merely the party's individual interests." *See id.*

For example, in *Midcal*, the State clearly "authorize[d] price setting ... by private parties" in the wine business and "enforce[d] the prices [they] established," but the State, unlike in *Parker*, did not itself approve those prices after "review[ing] the[ir] reasonableness." *Compare Midcal*, 445 U.S. at 105-06, *with id.* at 104 (citing *Parker*, 317 U.S. at 347, 352). In circumstances like these where "a program of supervision" is "absent," the anticompetitive conduct of private actors is not "fairly attributable to the State" because it is not "truly the product of state regulation." *See Patrick*, 486 U.S. at 100-01. Even though such conduct is clearly intended by the State, it still operates "by force of individual agreement" rather than "in the execution of a governmental policy." *See Parker*, 317 U.S. at 350, 352.

In short, "the requirement of active state supervision serves essentially an evidentiary function." *Hallie*, 471 U.S. at 46. It shows that there is an affirmative "state policy" of anticompetitive *regulation* and thereby establishes that the State is not simply "circumventing the Sherman Act's proscriptions 'by casting ... a gauzy cloak of state involvement over what is essentially a private [anti-competitive] arrangement.'" *See id.* at 46-47 (quoting

Midcal, 445 U.S. at 106); *accord S. Motor Carriers*, 471 U.S. at 57.

(ii) Precisely because the active-supervision standard serves only that narrow evidentiary function for "private parties," this Court in *Hallie* held that the standard does not apply where "the actor is a municipality." *See* 471 U.S. at 46-47. *Hallie* recognized that "there is little or no danger" that a State is immunizing "a *private* [anti-competitive] arrangement" when it clearly authorizes a *municipality* to act anticompetitively. *See id.* at 47. States "frequently choose to effect [their] policies through the instrumentality of [their] cities and towns." *See Cmty. Commc'ns Co. v. City of Boulder*, 455 U.S. 40, 51 (1982). And a "municipality's execution of ... a properly delegated function" to displace competition is not remotely "a gauzy cloak of state involvement" that "circumvent[s] the Sherman Act's proscriptions" on private business activities. *See Hallie*, 471 U.S. at 46-47. Instead, a municipal actor in such circumstances essentially functions as one of the State's "officers [or] agents" to perform regulatory "activities directed by the legislature." *See id.* at 38 (citing *Parker*, 317 U.S. at 350-51).

To be sure, *Hallie* did not itself purport to resolve whether the active-supervision standard "would also not be required" where "the actor is a state agency." *Id.* at 46 n.10. This Court, though, has always treated state agencies as entities that *may engage in* active supervision of private actors, not as entities that *must submit to* active supervision by other state entities. *See, e.g.*, *Parker*, 317 U.S. at 347, 352; *S. Motor Carriers*, 471 U.S. at 50-51, 62. Moreover, *Hallie* observed that the rule for state agencies

"likely" would be the same as for municipal actors, 471 U.S. at 46 n.10, and that observation followed inexorably from *Hallie's* own reasoning: Just as with a municipality, "there is little or no danger" that a State is casting "a gauzy cloak of state involvement" over "a *private* [anticompetitive] arrangement" when it clearly authorizes a *state agency* to act anti-competitively. *See id.* at 46-47. Indeed, even more so than with municipalities, state agencies are the State's *bona fide* "officers and agents" that are created to perform regulatory "activities directed by the legislature," *see id.* at 38, "because they are able to deal with problems unforeseeable to, or outside the competence of, the legislature," *see S. Motor Carriers*, 471 U.S. at 64.

It is therefore unsurprising that, as noted earlier about the state of the law prior to this case, "the courts uniformly agree[d] with th[e] conclusion" that "'public'" agencies are not subject to the active-supervision standard. *See* Areeda & Hovenkamp, *supra*, ¶ 226b, at 166. Under this Court's jurisprudence, the active-supervision standard applies where private actors seek to invoke the State's antitrust immunity for their clearly authorized anti-competitive business conduct; the standard is neither necessary nor proper where public officials seek to invoke the State's antitrust immunity for their clearly authorized anticompetitive regulatory conduct, as that conduct is unquestionably "the State's own" regardless.

3. Public Officials Enforcing A Clearly Articulated Anticompetitive State Policy Do Not Lose Their Antitrust Immunity Based On Alleged Misdeeds

This Court's decision in *Omni* confirms the conclusion that public officials are immune from federal antitrust law so long as they are enforcing a clearly articulated anticompetitive state policy. In *Omni*, state law clearly authorized municipal actors to displace competition by enacting zoning ordinances when certain conditions were met. *See* 499 U.S. at 370, 373. The questions that remained were whether the city there nevertheless could be stripped of its state-action immunity, either because (1) the zoning ordinances at issue were arguably "defective" under state law, *see id.* at 370-71, or because (2) those ordinances were allegedly enacted pursuant to an illicit "conspiracy" between the city's officials and a market participant, *see id.* at 367-69. This Court held that such asserted misdeeds are irrelevant to public officials' state-action immunity.

a. *Omni* first decided that it was immaterial whether the ordinances at issue were "substantively or ... procedurally defective" under the state law that clearly authorized the city to displace competition through zoning. *See id.* at 371. This Court explained that considering such state-law "[e]rrors" as part of "the *Parker*-defense authorization requirement would have unacceptable consequences." *Id.* It would "transform[ ] ... state administrative review into a federal antitrust job," thereby "undermining the very interests of federalism [*Parker*] is designed to protect." *Id.* at 372.

Accordingly, *Omni* held that, for purposes of the clear-articulation standard, "it is necessary to adopt a concept of authority broader than what is applied to determine the legality of ... action under state law." *Id.* This Court had no occasion to resolve definitively the outer boundaries of federal antitrust immunity when public officials err in enforcing state laws that clearly displace competition, but it did analogize to the extremely deferential approach adopted in the context of judicial immunity. *See id.* (citing *Stump v. Sparkman*, 435 U.S. 349, 356-57 (1978) ("A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the 'clear absence of all jurisdiction.'")).

b. *Omni* further concluded that it was immaterial whether the ordinances at issue were the product of a "secret anticompetitive agreement," under which the city would "protect [a company's] monopoly position" and "in return for which City Council members received advantages made possible by [the] monopoly," such as "contributed funds and free billboard space [for] their campaigns." *See id.* at 367 (internal quotation marks omitted). This Court ruled that "[t]here is no ... conspiracy exception" to state-action immunity for cases where public officials and private actors agree to restrain trade. *Id.* at 374.

Omni forcefully rejected the "proposition that ... governmental *regulatory* action may be deemed private—and therefore subject to antitrust liability—when it is taken pursuant to a conspiracy with private parties." *Id.* at 375. As this Court recognized, that proposition was irreconcilable with

"[t]he rationale of *Parker* ... that, in light of our national commitment to federalism, the general language of the Sherman Act should not be interpreted to prohibit anticompetitive actions by the States in their governmental capacities as sovereign regulators." *See id.* at 374.

Omni emphasized that "it is both inevitable and desirable that public officials often agree to do what one or another group of private citizens urges upon them," and that federal antitrust enforcers have no business second-guessing whether "governmental actions" are "'not in the public interest' or [are] in some sense 'corrupt.'" *See id.* at 375-77. Indeed, *Omni* stressed that this Court "ha[s] consistently sought to avoid" "deconstruction of the governmental process and probing of the official 'intent'" that underlie public action. *See id.* at 377-78.

In sum, *Omni* refused to "allow plaintiffs to look behind the actions of state sovereigns to base their claims on 'perceived conspiracies to restrain trade.'" *Id.* at 379. This Court underscored that, instead, "*any* [regulatory] action that qualifies as state action"—*i.e.*, public action to enforce a clearly articulated anticompetitive state policy, *see id.* at 372-74—"is '*ipso facto* ... exempt from the operation of the antitrust laws.'" *See id.* at 379 (quoting *Hoover*, 466 U.S. at 568).

B. The Fact That A State Agency's Officials Are Also Market Participants Does Not Require That They Be Actively Supervised When Enforcing Clearly Articulated Anti-competitive State Policy

The antitrust immunity that protects state agencies when they enforce a clearly articulated anti-competitive state policy fully applies to those particular state agencies that have a majority of officials who are also market participants—without any additional requirement that they be actively supervised by yet another state entity. This Court in *Parker* itself granted immunity to an agency run by officials who were also market participants and who were not actively supervised by any other state entity. *Supra* at 21-22. So did the Fifth Circuit in *Earles* and the Ninth Circuit in *Hass*; and no court has held to the contrary besides the Fourth Circuit below, despite the existence of countless state agencies operated by public officials who are also market participants. *Supra* at 3-5.

The conclusion that these state agencies are no more required to be actively supervised than any other *bona fide* state agency follows directly from the three key principles of this Court's state-action jurisprudence that were explained above and are applied further below: (1) the federalism-based commitment not to interfere with state officials who are enforcing anticompetitive state policy; (2) the limited role of the active-supervision standard, once the clear-articulation standard is satisfied; and (3) the irrelevance of whether public officials have a personal interest in using their public conduct to benefit either themselves or private actors.

1. Respect For Federalism Requires Deference To A State Legislature's Choice Of How To Staff And Structure Its Own Agencies

Principles of federalism strongly support recognizing state-action antitrust immunity even where the officials of a state agency who are enforcing clearly articulated anticompetitive state policy are also market participants and are not actively supervised by any other state entity. As discussed above, the foundational premise of the state-action doctrine is that, given our "dual system of government," the intent "to restrain a state or its officers or agents from activities directed by its legislature ... is not lightly to be attributed to Congress." *See Parker*, 317 U.S. at 350-51. And the notion that Congress clearly intended to interfere with sovereign acts of State government is just as unwarranted where a State decides that the agency officials charged with enforcing its anticompetitive policies shall also be market participants.

That idea is equally unwarranted, of course, because federalism demands equal (if not greater) respect for a State's choices concerning "the character of those who exercise government authority" and "the structure of its government," given that those choices lie at the very core of how "a State defines itself as a sovereign." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). This is why "federal legislation threatening to trench on the States' arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State's chosen disposition of its own power." *Nixon*

v. Missouri Mun. League, 541 U.S. 125, 140 (2004). Indeed, denying state-action immunity due to a State's sovereign choices concerning how to staff and structure its regulatory arms would "undermin[e] the very interests of federalism [the *Parker* doctrine] is designed to protect." *See Omni*, 499 U.S. at 372.

First, "[i]t is obviously essential to the independence of the States" that they retain "their power to prescribe the qualifications of their own officers." *See Gregory*, 501 U.S. at 460. Here, in particular, the benefits for the States in deciding that the public officials who run their regulatory agencies should also be market participants, and the corresponding costs to the States if federal antitrust law coerces them to make the contrary decision, are self-evident and significant.

Practicing professionals often have "the specialized knowledge required to evaluate" the regulated conduct. *See California Dental Ass'n v. FTC*, 526 U.S. 756, 772 (1999). Their "specialized knowledge or expertise," as well as the ordinary reasons to reduce the size of the full-time "bureaucracy," explains the longstanding government tradition of employing "public servant[s]" who only "temporarily or occasionally discharge[ ] public functions" and who are otherwise "permitted to carry on some other regular business." *See Filarsky v. Delia*, 132 S. Ct. 1657, 1662-63, 1665-66 (2012). In fact, because "[a]gencies are created ... to deal with problems ... outside the competence of[ ] the legislature" and the lay public, a reduction in the States' desired level of professional involvement in agencies might "diminish, if not destroy, [their] usefulness." *Cf. S. Motor Carriers*, 471 U.S. at 64.

Second, deciding which of the States' "agencies ... may be entrusted" with "exercising [which] of the[ir] governmental powers" is likewise "central to state self-government." *See City of Columbus v. Ours Garage & Wrecking Serv., Inc.*, 536 U.S. 424, 437 (2002). Again, here in particular, the benefits for the States in deciding not to actively supervise regulatory agencies run by market-participant officials, and the corresponding costs to the States if federal antitrust law coerces them to make the contrary decision, are self-evident and significant.

Vesting final administrative authority in a single agency that is run by market-participant officials streamlines decisionmaking: it avoids a redundant bureaucracy in which all of the expert agency's anti-competitive decisions—including routine licensing decisions concerning professional competence—must undergo "pointed reexamination" by a second state entity "exercis[ing] ultimate control." *See Midcal*, 445 U.S. at 106; *Patrick*, 486 U.S. at 101. Moreover, the single-agency structure leaves regulatory decisions in the hands of the officials with specialized expertise. It also encourages market participants to "perform[ ] this essential public service" in the first place, both by providing them with meaningful responsibility and by eliminating the "deter[rrent]" "threat of being sued for damages" if the activeness of state supervision is *later* deemed insufficient by federal antitrust enforcers. *Cf. Hoover*, 466 U.S. at 580 n.34.

Notably, all of the foregoing reasons why the States long have chosen to regulate professionals in this manner were discussed, and will further be detailed, by the Board's *amici*, including numerous

States and national associations of both regulators and the regulated. More notably still, even academic supporters of the FTC's position acknowledge the significant disruption that will be caused by "put[ting] thousands of boards under the Sherman Act's microscope," thereby "alter[ing] the equilibrium of a complex system of regulation" and "pressur[ing]" the States to choose among "option[s] [that] will require a departure from the current practice of using practitioner-dominated administrative boards." *See* Edlin & Haw, *supra*, at 1144, 1154. Requiring active supervision of state agencies run by market-participant officials would thus undermine *Parker* and its progeny by failing to respect "the dignity ... of sovereignty" retained by the States. *See Alden v. Maine*, 527 U.S. 706, 715 (1999).

2. A State's Use Of Market Participants As Agency Officials Poses No Real Danger That The State Is Merely Immunizing Private Agreements Rather Than Truly Enforcing Its Own Clearly Articulated Anticompetitive Policy

There is no doctrinal basis for requiring a state agency's enforcement of anticompetitive state policy to be actively supervised by another state entity simply because the agency's public officials are also market participants. As discussed above, "[o]nce it is clear that state authorization exists [to act anti-competitively], there is no need to require the State to supervise actively" unless that is "necessary to prevent a State from circumventing the Sherman Act's proscriptions 'by casting ... a gauzy cloak of state involvement over what is essentially a private [anticompetitive] arrangement.'" *See Hallie*, 471

U.S. at 46-47 (quoting *Midcal*, 445 U.S. at 106). And there is no realistic danger that a State is engaged in such circumvention when it chooses to staff *bona fide* regulatory agencies with officials who are also market participants.

The States obviously have not gone to the trouble of creating the countless such agencies that exist all as an elaborate sham to "exempt *private* action from the scope of the Sherman Act." *See Omni*, 499 U.S. at 379. Instead, the States have created these public "regulatory agencies" to "implement ... their anti-competitive policies," *see S. Motor Carriers*, 471 U.S. at 64, using the "specialized knowledge or expertise" of market participants, *see Filarsky*, 132 S. Ct. at 1665-66.

Simply put, just by establishing a *bona fide* state agency that is operated by public officials who are also market participants, a State *already* "has made [their official] conduct its own." *See Patrick*, 486 U.S. at 105-06. By definition, those official actions do not "operate by force of individual agreement," but only "in the execution of a governmental policy," which Congress lacked any "purpose ... to restrain." *See Parker*, 317 U.S. at 350, 352.

Here, in particular, the Board is "the agency of [North Carolina] for the regulation of the practice of dentistry," charged with enforcing the State's clearly anticompetitive policy of restricting dental practice to licensed dentists. *See* N.C. Gen. Stat. §§ 90-22(b), 90-29, 90-40, 90-40.1(a), 90-41(d). It cannot seriously be claimed that, in vesting control over this agency with officials who are also market participants, North Carolina was just "casting ... a gauzy cloak of state involvement" to "give immunity" to "private

[anticompetitive] arrangement[s]." *See Midcal*, 445 U.S. at 106. Instead, like all other States, North Carolina simply recognizes that public officials who are also practicing dentists are best positioned to fulfill the "public interest" in ensuring that "only qualified persons [are] permitted to practice dentistry." *See* N.C. Gen. Stat. § 90-22(a),(b).

The Board's *bona fide* status as a state agency is confirmed by the undisputed fact that it operates pursuant to state-law powers and state-law duties that public entities traditionally have and that private actors typically do not have. For starters, the State's full imprimatur lies behind the Board's various types of enforcement authority. *Supra* at 6. The FTC itself repeatedly emphasized that the Board's "cease and desist letters" had the tendency and effect of excluding competition *because* they were official communications from the State (not just private complaints from competitors). *See* Pet.App. 107a, 112a-113a, 128a-129a. More importantly, the State also subjects the Board to the usual litany of weighty responsibilities imposed on administrative agencies, such as requirements about procedures, ethics, and oversight, as well as judicial review of the Board's enforcement actions. *Supra* at 6-7. These obligations underscore that the State has done nothing remotely like slapping a formal public label on conduct that in substance remains "essentially a private [anticompetitive] arrangement." *See Midcal*, 445 U.S. at 106. Accordingly, "there is no need to require the State to supervise actively [this public entity's] execution of what is a properly delegated function," *see Hallie*, 471 U.S. at 46-47, because "state administrative review" is not "a federal antitrust job," *see Omni*, 499 U.S. at 372.

3. The Regulatory Acts Of A State Agency's Officials Retain Their Public Character Even When Those Officials Also Have Private Interests As Market Participants

It is entirely improper to equate a state agency's official enforcement of state law with mere private action based simply on the fact that the agency's public officials are also market participants. As discussed above, this Court has disavowed any notion that "governmental *regulatory* action may be deemed private ... when it is taken pursuant to a conspiracy with private parties." *Omni*, 499 U.S. at 375. That decision squarely forecloses deeming the official actions of a state agency to be "private" conduct that must be actively supervised by another state entity just because the agency's officials are also market participants who may have an interest to "conspire" among themselves or with others.

Omni does not "allow plaintiffs to look behind the actions of state sovereigns to base their claims on 'perceived conspiracies to restrain trade.'" *Id.* at 379. Yet the FTC's merits claim here is precisely that the Board's members "conspired" to exclude competition by agreeing to enforce against non-dentist teeth whiteners the anticompetitive state prohibition on the unlicensed practice of dentistry. *See* Pet.App. 93a-104a, 112a-114a. Again, *Omni* held that "[t]here is no such conspiracy exception," *see* 499 U.S. at 374, because federal antitrust enforcers have no business second-guessing whether "governmental actions" are "'not in the public interest' or [are] in some sense 'corrupt,'" *see id.* at 375-77.

In this regard, *Parker* itself is factually on all fours. As *Omni* explained, that seminal case granted

immunity with full awareness that "[t]he California marketing scheme ... [could] readily be viewed as the result of a 'conspiracy' to put the 'private' interest of the State's raisin growers above the 'public' interest of the State's consumers." *Id.* at 377. In fact, a super-majority of the Commission that approved the program in *Parker* were themselves also producers of agricultural commodities. *Supra* at 21-22. Yet, rather than treating the Commission's market-participant members as "private" "conspirators" who needed to be actively supervised by other state actors, *Parker* held that "the state [was] acting through the Commission" and that its members were "officers" who could not be "restrain[ed] ... from activities directed by its legislature." *See* 317 U.S. at 350-51, 352; *see also Filarsky*, 132 S. Ct. at 1663 ("[T]he common law did not draw a distinction between public servants and private individuals engaged in public service in according protection to those carrying out government responsibilities.").

Indeed, *Omni* rejected a proposed "conspiracy exception" to state-action immunity where the "anticompetitive agreement" alleged was outright "bribery," because federal antitrust law "is not directed to th[e] end" of "vindicat[ing] ... good government." *See* 499 U.S. at 367, 378-79. Given that even the direct financial benefit of bribes for their regulatory actions did not justify treating the City Council members in *Omni* as "private" actors who were disentitled to state-action immunity, there is no legitimate basis for treating in that manner public officials like the Board's members here just because their regulatory actions may also indirectly benefit them as market participants.

II. THE FTC AND THE FOURTH CIRCUIT EMPLOYED AN ERRONEOUS RATIONALE FOR REQUIRING ACTIVE SUPERVISION OF STATE AGENCIES WHOSE OFFICIALS ARE ALSO MARKET PARTICIPANTS

The FTC and the Fourth Circuit failed to recognize that the official enforcement of a clearly articulated anticompetitive state policy by a *bona fide* public actor legally retains its public character—and thus retains its state-action immunity—even where a majority of the public officials also may have private interests. In adopting a contrary rule, the tribunals below relied on a novel and radical rationale: (1) they started from the premise that the function of the active-supervision standard is to address the "danger" that the entity engaged in anti-competitive conduct is "acting to further [its] own interests, rather than the governmental interests of the State"; and (2) they then reached the conclusion that active supervision is required where a state agency is not "sufficiently independent from the interests of those being regulated." *See* Pet.App. 48a-50a; *see also id.* 14a-15a.

This two-step theory—in essence, a "risk of self-interest" rationale—is fundamentally flawed. In both its premise and its conclusion, the rationale is directly refuted by this Court's precedents. Nor do the decisions of this Court that were cited by the FTC and the Fourth Circuit even arguably suggest otherwise. As for the academic authorities that the tribunals below invoked as support on this question, they are neither well reasoned nor well accepted.

A. This Court's State-Action Jurisprudence Forecloses The "Risk Of Self-Interest" Rationale

The rationale's premise is wrong, because the active-supervision standard simply has nothing to do with the "danger" that the State's anticompetitive interests are not being furthered. The rationale's conclusion is wrong as well, because antitrust immunity never depends on the State's officials being "sufficiently independent" from private actors. And, as a result of these errors, the rationale also contravenes core principles of federalism.

1. To begin with, the premise of the "risk of self-interest" rationale misunderstands the distinct roles that this Court has assigned to the clear-articulation and active-supervision standards. Proving that a state agency is enforcing a clear state policy to displace competition is sufficient assurance for purposes of federal antitrust law that the agency's officials who are market participants are furthering the State's interests. Additionally requiring active supervision is neither necessary nor proper to deal with the alleged "danger" of self-interest.

First, given the clear-articulation standard, States cannot "inadvertently authoriz[e] anti-competitive conduct" by agencies with market-participant officials, because "the displacement of competition [must be] the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature." *See Phoebe Putney*, 133 S. Ct. at 1013, 1016. Thus, where that standard is satisfied, the public interests of the State and any private interests of its market-participant officials are *both anticompetitive* and *presumptively aligned.*

For example, in *Parker*, California and the super-majority of agricultural producers on the Commission shared the same interest in "maintain[ing] prices" in agricultural commodities. *See supra* at 21-22. Similarly, here, North Carolina and the Board's practicing dentists share the same interest in ensuring that "only qualified persons be permitted to practice dentistry." N.C. Gen. Stat. § 90-22(a). As these examples illustrate, in the ordinary case where the clear-articulation standard is satisfied—*e.g.*, a depressed agricultural market in *Parker* or an incompetent dentist in North Carolina—anticompetitive regulatory action will further both the State's interests and the private interests of the State's officials who are market participants. It thus would be a gratuitous burden to require active supervision, as well as a nonsensical penalty to deny immunity absent such supervision.

Second, while it is conceivable that officials who are also market participants could have incentives to *over-enforce* their States' anticompetitive policies, the States are fully equipped to handle that concern themselves through, among other things, "state administrative review." *See Omni*, 499 U.S. at 371-72. It is not "a federal antitrust job" to sanction the States' officers for acting in a manner that is "substantively or ... procedurally defective" under state law. *Id.*

For example, in *Omni*, there was certainly a danger that the City Council members who were allegedly being bribed to enact a zoning ordinance had not complied with all the relevant conditions of the state-law authorization to enact such anti-competitive restraints. *See id.* at 367, 371. Yet this

Court nevertheless granted federal antitrust immunity and held that it is up to the States to police their own subordinates for compliance with the particulars of their anticompetitive laws. *See id.* at 371-72, 378-79. Likewise, here, any concern about the specific manner in which the Board enforced the statutory ban on the unlicensed practice of dentistry can be raised before North Carolina's courts or with the State's political branches that perform oversight of the Board. *Supra* at 6-7.

Third, rather than redundantly "protecting" the State from unintended or excessive anticompetitive conduct, the distinct role of the active-supervision standard is "to prevent a State" from intentionally authorizing private parties to violate federal law under "a gauzy cloak of state involvement." *See Hallie*, 471 U.S. at 46-47; *accord S. Motor Carriers*, 471 U.S. at 57. In other words, the "danger" that *Hallie* and other cases analyzed was not whether "state policy" is being flouted by the persons purporting to enforce it, but rather whether the only "state policy" that exists is merely to allow private actors to violate federal law. *See Hallie*, 471 U.S. at 46-47; *accord Midcal*, 445 U.S. at 105-06. That danger simply is not present where, as here, a *bona fide* state agency is enforcing an anticompetitive regulatory regime. *Supra* at 36-38.

In sum, the premise of the "risk of self-interest" rationale is wholly mistaken. The active-supervision standard is not designed to address an alleged "danger" of self-interested actors deviating from the State's interests. That concern is instead the domain of the clear-articulation standard and state administrative law.

2. In addition, the conclusion of the "risk of self-interest" rationale is irreconcilable with *Omni's* rejection of a "conspiracy exception." Deciding if public officials are "sufficiently independent" from private actors is foreclosed both by *Omni's* holding and by its reasoning.

First, *Omni* held that it is improper for "governmental *regulatory* action [to] be deemed private ... when it is taken pursuant to a conspiracy with private parties." *See* 499 U.S. at 374-75. By its plain terms, that unqualified holding bars any attempt to deem a state agency's enforcement actions to be "private" conduct that must be actively supervised based on supposition that the agency's officials are "not sufficiently independent" due to a "conspiracy" on behalf of market participants.

Omni's facts confirm this conclusion. The City Council members there, far from being "sufficiently independent" from regulated private interests, were allegedly being bribed by a private monopolist in a "conspiracy" to enact favorable zoning ordinances. *See id.* at 367. Yet this Court nevertheless granted immunity, as they were still public officials enforcing a clearly articulated state policy to displace competition. *See id.* at 370-374, 378-79.

Second, *Omni* reasoned in part that this Court "ha[s] consistently sought to avoid" "deconstruction of the governmental process and probing of the official 'intent'" that underlies public conduct. *Id.* at 377, 379. As *Omni* observed, *Parker* and its progeny provide that, "[w]here the action complained of ... [is] that of the State itself, the action is exempt from antitrust liability regardless of the State's motives in taking the action." *Id.* at 377-78 (quoting *Hoover*,

466 U.S. at 579-80). *Omni* confirmed that motives are likewise irrelevant for the non-sovereign public officials who enforce the State's clearly articulated anticompetitive policies. *See id.* at 373-74, 379; *see also City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 411 n.41 (1978) (plurality opinion) ("We think it obvious that the fact that the ancillary effect of [a state agency's] policy, or even the conscious desire on its part, may have been to benefit the lawyers it regulated, cannot transmute the [agency]'s official actions into those of a private organization.").

This unqualified reasoning forecloses imposition of the active-supervision standard on a state agency based on the theory that the agency's "insufficient independence" gives rise to the risk of conflicts of interest. Again, this Court in *Omni* "reaffirm[ed] [its] rejection of any interpretation of the Sherman Act that would allow plaintiffs to look behind the actions of state sovereigns to base their claims on 'perceived conspiracies to restrain trade.'" 499 U.S. at 379 (quoting *Hoover*, 466 U.S. at 580).

Third, *Omni* also reasoned in part that it would be "impractical" to determine whether a so-called "conspiracy" was "'not in the public interest,'" because "[f]ew governmental actions are immune from th[at] charge." *Id.* at 377. Yet it likewise would be "impractical" to assess the alleged "danger" that a state agency is "insufficiently independent" from regulated interests, because that rationale could extend to *all* agencies.

There is no principled basis for cabining the rationale to agencies like the Board with part-time officials who are also current market participants,

because there are myriad other ways that state regulators may be biased towards, or otherwise not independent from, regulated interests. For starters, even full-time officials are well aware that they can potentially benefit from their regulatory actions as *future* market participants. "[M]any people move between government regulatory positions, private industry, and private law firm jobs," so regulators often have "a significant and direct, albeit not immediate, interest in the work they do." *See* Steven Semeraro, *Demystifying Antitrust State Action Doctrine*, 24 Harv. J.L. & Pub. Pol'y 203, 252 (2000); *see also* Pet.App. 96a (FTC itself stressing that antitrust law extends to conspiracies between "potential competitors"). Furthermore, wholly apart from personal financial self-interest, the actions of regulators are hardly independent of regulated interests. To take one well-known example, public-choice theorists have long maintained that agencies are vulnerable to "regulatory capture" by special interests. *See, e.g.*, John Shepard Wiley Jr., *A Capture Theory of Antitrust Federalism*, 99 Harv. L. Rev. 713, 723-26 (1986).

Accordingly, it is "impractical" to condition federal antitrust immunity on the "vague line[ ]" whether a state agency is sufficiently independent of regulated interests, because that line is not susceptible to judicially administrable (or even theoretically coherent) application. *See Omni*, 499 U.S. at 377. Instead, an "insufficient independence" inquiry would expose *every* state agency to an "*ex post facto*" assessment of its regulatory motives, and thus would "go[ ] far 'to compromise the States' ability to regulate their domestic commerce.'" *See id.* (quoting *S. Motor Carriers*, 471 U.S. at 56).

In sum, the conclusion of the "risk of self-interest" rationale is also wholly mistaken. *Omni's* holding, facts, and reasoning all repudiate the proposition that public officials must be "sufficiently independent" from regulated private interests in order to be immune from federal antitrust scrutiny.

3. Lastly, given the points made above, the "risk of self-interest" rationale is also a gross affront to federalism. At every turn, it unjustifiably denigrates "the States' arrangements for conducting their own governments." *See Nixon*, 541 U.S. at 140.

First, the rationale improperly questions the sovereign decision that the benefits of expert regulators outweigh the costs of actual or potential conflicts of interest. *See Gregory*, 501 U.S. at 460 ("It is obviously essential to the independence of the States" that they retain "their power to prescribe the qualifications of their own officers."); *Omni*, 499 U.S. at 378-79 (Federal antitrust law "is not directed to th[e] end" of "vindicat[ing]" alleged "principles of good government.").

Second, the rationale improperly questions the sovereign decision as to the nature and amount of oversight needed to address any risk of conflicts of interest. *See Ours Garage*, 536 U.S. at 437 (The States' choices concerning which of their "agencies ... may be entrusted" with "exercising [which] of [their] governmental powers" is "central to state self-government."); *Omni*, 499 U.S. at 372 ("[S]tate administrative review" is not "a federal antitrust job.").

Third, adding insult to injury, the rationale improperly questions the integrity of State officials who have sworn an oath of allegiance to the State.

See Withrow v. Larkin, 421 U.S. 35, 55 (1975) ("[S]tate administrators 'are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.'" (quoting *United States v. Morgan*, 313 U.S. 409, 421 (1941))); *Omni*, 499 U.S. at 377 (This Court "ha[s] consistently sought to avoid" "deconstruction of the governmental process and probing of the official 'intent'" that underlies public conduct.).

In sum, "a State defines itself as a sovereign" "[t]hrough ... the character of those who exercise government authority" and "the structure of its government." *Gregory*, 501 U.S. at 460. By maligning how the States have chosen to define themselves, the FTC disrespects "the dignity ... of sovereignty" retained by the States. *See Alden*, 527 U.S. at 715.

B. No Decision Of This Court Supports The "Risk Of Self-Interest" Rationale

Apart from misunderstanding the type of "danger" that was assessed in *Hallie* (and other cases), the FTC and the Fourth Circuit principally relied on two decisions from this Court as support for their position: *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), and *FTC v. Ticor Title Insurance Co.*, 504 U.S. 621 (1992). *See* Pet.App. 14a-15a, 48a-51a. Neither case is apposite.

1. As for *Goldfarb*, although that case denied state-action immunity to a state agency whose officials were also market participants, it did not suggest in any way that the composition of such agencies required them to be actively supervised in order to obtain immunity. Rather, *Goldfarb* held

that the State Bar had not satisfied the "threshold inquiry ... whether the activity [was] required by the State acting as sovereign," "because it [could not] fairly be said that the State of Virginia through its Supreme Court Rules required [the Bar's] anti-competitive activities." *See* 421 U.S. at 790. In other words, the 1975 decision in *Goldfarb* was applying what the 1980 decision in *Midcal* would later denominate the clear-articulation standard. *See S. Motor Carriers*, 471 U.S. at 60-61 (describing *Goldfarb* as a case where "Virginia 'as sovereign' did not have a 'clearly articulated policy' designed to displace price competition among lawyers"); *see also Phoebe Putney*, 133 S. Ct. at 1016; *Midcal*, 445 U.S. at 104-05.

Accordingly, the FTC and the Fourth Circuit entirely misconstrued the import of *Goldfarb's* statement that "[t]he fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members." *See* 421 U.S. at 791. That statement simply meant that "a State Bar, *acting alone*, could not immunize ... anticompetitive conduct," because "the State 'acting as sovereign' [must] intend[ ] to displace competition." *See S. Motor Carriers*, 471 U.S. at 60. The statement cannot properly be interpreted to mean—in conflict with *Parker* itself—that a state agency whose officers are also market participants must be actively supervised even when it is enforcing a clearly articulated anticompetitive state policy.

To be sure, *Goldfarb* did observe that "there [was] no indication in th[e] record that the Virginia

Supreme Court approve[d]" the State Bar's ethical opinions. *See* 421 U.S. at 791. But that observation just mooted any possible argument that *ex post* supervision of the agency by the sovereign might have been *sufficient* to cure the absence of *ex ante* articulation by the sovereign. *See id.*; *see also Hoover*, 466 U.S. at 572-73. Again, the observation cannot properly be interpreted to imply that *ex post* supervision of the agency is *necessary* even where *ex ante* articulation is already present.

2. As for *Ticor*, that case did not involve the acts of a state agency at all. Rather, the defendants there were "private entities organized by title insurance companies to establish uniform rates for their members." 504 U.S. at 628.

Accordingly, the FTC and the Fourth Circuit entirely misconstrued the import of *Ticor's* statement that "the purpose of the active supervision inquiry ... is to determine whether the State has exercised sufficient independent judgment and control so that the details of the [anticompetitive conduct] have been established as a product of deliberate state intervention, not simply by agreement among private parties." *See id.* at 634-35. That statement was just a reaffirmation of the settled distinction that "a State may not confer antitrust immunity on private persons by fiat," but may incorporate their conduct into "the State's own" "anticompetitive scheme." *See id.* at 633, 635 (citing *Midcal* and *Patrick*). The statement cannot properly be interpreted to sanction an unprecedented inquiry into whether "the State's own" officers are "sufficiently independent" from regulated interests. To the contrary, the very same passage in *Ticor* admonished that "the purpose of the

active supervision inquiry is not to determine whether the State has met some normative standard ... in its regulatory practices." *See id.* at 634; *accord Omni*, 499 U.S. at 378-79 (federal antitrust law "is not directed to th[e] end" of "vindicat[ing]" alleged "principles of good government").

The private-actor context of *Ticor* likewise explains its conclusion that "principles of federalism" warranted a rigorous application of the active-supervision standard. *See* 504 U.S. at 635-37. This Court observed that "essential national policies [may be] displaced by state regulations" only where the State assumes "political responsibility" by making the anticompetitive conduct its own. *See id.* at 636. And this Court further recognized that the clear-articulation standard alone cannot prevent an "intended state policy" that delegates displacement of competition to private actors, thereby "obscur[ing]" political responsibility. *See id.* at 636-37. But none of this reasoning has any application where, as here, the State's "political responsibility" is unmistakable because the conduct of a *bona fide* state agency is challenged and, in fact, the whole reason that the agency's conduct had an anticompetitive effect is that it carried the State's official imprimatur. *Supra* at 38.[2]

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[2] The State's self-evident "political responsibility" in this context is underscored by this Court's later decision in *Phoebe Putney*, which rejected the sort of "loose application of the clear-articulation test" that might have caused past concerns that satisfaction of that test "shows little more than that the State has not acted through inadvertence." *Compare Phoebe Putney*, 133 S. Ct. at 1012-13, 1016, *with Ticor*, 504 U.S. at 636.

C. The Academic Support For The "Risk Of Self-Interest" Rationale Is Both Limited And Unpersuasive

Lacking any real support in this Court's cases, the FTC and the Fourth Circuit also highlighted two academic sources, which offer similar proposals that the actions of public decisionmakers who are also financially interested market participants should not be immune from federal antitrust review. *See* Pet.App. 14a, 52a (citing Areeda & Hovenkamp, *supra*, ¶ 227b, and Einer Richard Elhauge, *The Scope of Antitrust Process*, 104 Harv. L. Rev. 667 (1991)). But these particular academic proposals conflict with this Court's precedents and lack widespread approval among scholars.

1. Most importantly, neither the Areeda and Hovenkamp treatise nor Professor Elhauge's article make any serious effort to square their positions on this issue with this Court's contrary cases. These academics have no answer to either *Parker* or *Omni*, each of which granted immunity notwithstanding the unquestionable financial self-interest of the public officials involved.

As for the Areeda and Hovenkamp treatise, the proposal there does not even purport to be consistent with this Court's precedents. Instead, the treatise offers a thinly reasoned policy "[r]ecommendation[ ]" that makes no effort to reconcile itself with existing doctrine. *See* Areeda & Hovenkamp, *supra*, ¶ 227b, at 208-09.

As for Professor Elhauge's article, the proposal there does claim to be advancing a "descriptive thesis" that the "implicit process view" underlying this Court's "antitrust case law" is that only

"financially disinterested" decisionmakers are entitled to immunity. *See* Elhauge, *supra* at 671-72. But the article simply overlooks the market-participant composition of the Commission in *Parker*. *See id.* at 721 & n.266. Moreover, the article was written while the *Omni* case was still pending in this Court, and the article urged that a "co-conspiracy exception" should be recognized if (but only if) a public official "ha[d] a financial interest in the action," which would "clearly" include cases where the official "[a]ccepts a bribe." *See id.* at 704-06 & n.185. Instead, of course, *Omni* rejected even that narrow version of the "conspiracy exception," and it did so with full awareness of Elhauge's article (which it cited as support when rejecting broader versions of the conspiracy exception). *See* 499 U.S. at 375, 378-79.

Indeed, in a later article, Professor Elhauge conceded that *Omni's* refusal to recognize a "bribery" exception "may represent a departure from [his] functional process approach," but he tried to revive his theory by asserting that *Omni's* "statements [about bribery] were dicta." *See* Einer Elhauge, *Making Sense of Antitrust Petitioning Immunity*, 80 Cal. L. Rev. 1177, 1244-45 (1992). Yet that assertion is directly contradicted by this Court's description of the facts alleged in *Omni*, which involved a *quid pro quo* "agreement" under which City Council members received campaign contributions "in return for" protecting their co-conspirator's monopoly. *See* 499 U.S. at 367.

Accordingly, other scholars have recognized that *Omni* rejects the "financial disinterest" theory that underlies the proposals in both Professor Elhauge's

article and the Areeda and Hovenkamp treatise. For example, one such critique pointedly observes that "[t]he ample evidence of financial collusion between Omni and the City provides further reason to reject Professor Elhauge's view," because "[t]o call the municipal legislators in *Omni* 'disinterested' would be to deprive the word of any meaning at all," yet "that is precisely what Professor Elhauge concludes." *See* David Mcgowan & Mark A. Lemley, *Antitrust Immunity: State Action and Federalism, Petitioning, and the First Amendment*, 17 Harv. J.L. & Pub. Pol'y 293, 340 (1994); *see also* C. Douglas Floyd, *Plain Ambiguities in the Clear Articulation Requirement for State Action Antitrust Immunity: The Case of State Agencies*, 41 B.C. L. Rev. 1059, 1135 (2000) (noting that, "in *Omni*," this Court "appears to have rejected the[ ] approach[ ]" in Professor Elhauge's article that would deny immunity to "state agencies if they were determined ... to have been 'financially interested' in the result" of their actions).

2. Even apart from the conflict with this Court's precedent, the "financial disinterest" theory that underlies the proposals in both Professor Elhauge's article and the Areeda and Hovenkamp treatise hardly represents a consensus academic view. Indeed, no such consensus exists.

Most specifically, Professor Lopatka, one of the leading scholars of the state-action antitrust doctrine, has expressly disagreed with the idea of requiring active supervision of public officials who are financially interested. Like the Board here, he has argued that it is "an internal matter for the state to resolve" whether to "choose[ ] to empower an agency" that "is apt to foster anticompetitive policies

that serve the financial interests of its members at the expense of the public." *See* Lopatka, *supra*, at 1028-29; *see also* Floyd, *supra*, at 1134-35 & n.364 (advocating that courts determine whether a given entity is a "public state agenc[y]" or a "private actor[ ]" based on a number of functional factors associated with traditional government agencies, rather than based solely on member composition). And Professor Lopatka likewise has argued that requiring active supervision of state agencies would impose significant costs (as it is "intrusi[ve]" and not "practic[al]"), yet would provide minimal benefits (given the clear-articulation standard). *See* Lopatka, *supra*, at 1002-05, 1040-41.

More generally, Judge Garland has criticized proposals to consider the influence of private actors on public action as inconsistent with the federalism underpinnings of the state-action antitrust doctrine. He has emphasized that the "revisionist" focus on "suspicions that regulatory programs have been captured by special interests" is incompatible with this Court's "effort to respect the results of the political process ... at both the state and federal levels ... by applying the state action doctrine to oust ... only those state regulations ... that seek to delegate to private parties the power to restrain market competition." *See* Merrick B. Garland, *Antitrust & State Action: Economic Efficiency and the Political Process*, 96 Yale L.J. 486, 487 (1987). Thus, like the Board here, he has observed that the active-supervision standard plays only the very narrow role of preventing improper delegation to nongovernmental actors: whereas "the 'clear articulation' requirement ensures that ... the state does in fact intend to displace competition," "[t]he

supervision requirement ensures that[,] even where there is state authorization[,] such authorization constitutes ... a scheme of state regulation" rather than "mere permission to violate the Sherman Act." *See id.* at 501; *accord* William H. Page & John E. Lopatka, *State Regulation in the Shadow of Antitrust: FTC v. Ticor Title Insurance Co.*, 3 Sup. Ct. Econ. Rev. 189, 212-13 (1993) ("The active supervision requirement ... assures that the stated policy is not a disguise or sham," but it "is not imposed ... to assure that private conduct is actually within the scope of the legislative authorization.").

Furthermore, Judge Easterbrook would expand the state-action doctrine by completely eliminating the active-supervision standard, thereby allowing States to delegate the power to restrain competition even to nongovernmental actors. He has reasoned that a State should be allowed to repeal federal antitrust law within its jurisdiction (so long as there are no extraterritorial effects), because that is more economically efficient than the "extensive command-and-control regulation" that the active-supervision standard encourages. *See* Frank H. Easterbrook, *Antitrust and the Economics of Federalism*, 26 J.L. & Econ. 23, 29-33, 38, 45 (1983). Also urging that the state-action doctrine be expanded is Professor Floyd, who would allow "state agencies" to satisfy the clear-articulation standard by themselves "prescrib[ing] competition policy for the state as a whole under general delegations of authority from the state legislature." *See* Floyd, *supra*, at 1136.

In sum, as is often true, the academy "has hardly been of one voice" in analyzing this Court's state-action antitrust jurisprudence. *See id.* at 1060. And,

as is also often true, the academic commentary "has had little discernible impact on [this Court's] decisions." *See id.* at 1061.

Accordingly, rather than embarking down the new path that some academics have proposed, this Court should re-establish the judicial consensus that existed before the Fourth Circuit adopted the FTC's position in this case. Countless State agencies have been staffed and structured in reliance on cases like *Earles*, *Hass*, *Omni*, *Hallie*, and *Parker* itself; it would cause massive disruption to undo all that at this late date, as the Board's *amici* have explained and will explain further. Indeed, even some of the FTC's academic supporters admit that their position "would upset the balance between state and federal power struck in *Parker* and its progeny," and "alter the equilibrium of a complex system of regulation," by "put[ting] thousands of boards under the Sherman Act's microscope." *See* Edlin & Haw, *supra*, at 1136, 1144, 1154. Especially given the federalism concerns implicated, this Court instead should adhere to the well-settled state-action jurisprudence that has been developed over the course of 70 years.

III. IT IS IRRELEVANT THAT THE MARKET-PARTICIPANT OFFICIALS OF A STATE AGENCY ARE ELECTED TO OFFICE BY OTHER MARKET PARTICIPANTS

Finally, for the same reasons that it does not matter that a state agency's officials are market participants, it also does not matter that those officials are elected to office by other market participants. Indeed, while the Fourth Circuit at times emphasized the fact that the Board's dentist members were elected by the other practicing

dentists in North Carolina, *see* Pet.App. 16a-17a; *id.* 29a-31a (Keenan, J., concurring), the FTC itself only briefly referenced that fact, *see id.* 59a-60a, and did not treat the fact as essential to its decision, *see id.* 35a-36a, 58a, 68a, 81a. The particular method under state law for selecting market-participant officials is completely irrelevant under the state-action doctrine.

First, the scope of state-action immunity cannot properly turn on the method by which state officials are selected, because the federalism principles underlying the immunity require respecting the States' "power to prescribe the qualifications of [their] officers *and the manner in which they shall be chosen.*" *See Gregory*, 501 U.S. at 460 (emphasis added). It is not lightly to be inferred that Congress intended to nullify the States' sovereign discretion to decide that "specialized knowledge [is] required to evaluate" (*California Dental*, 526 U.S. at 772) which particular market participants should be selected to serve as officers of an expert state agency. *See Parker*, 317 U.S. at 350.

Second, the fact that other market participants elected a State's market-participant officials does not affect the conclusion that an official state agency is no mere "gauzy cloak" created to shield those officials' "*private* [anticompetitive] arrangement[s]." *See Hallie*, 471 U.S. at 46-47. It remains the case that the enforcement of a clearly articulated anti-competitive state policy by a *bona fide* state regulatory agency charged with traditional state-law powers and duties is, by definition, "the State's own" regulatory conduct. *See Ticor*, 504 U.S. at 635.

Third, "governmental *regulatory* action may [not] be deemed private" simply because it "is taken

pursuant to a conspiracy" with, or on behalf of, the "private parties" that elected public officials. *See Omni*, 499 U.S. at 374-75. Federal antitrust law will not second-guess the "motives" or otherwise "look behind the actions" of public officials enforcing a clearly articulated anticompetitive state policy. *See id.* at 377-79. Ensuring that state officials' electoral accountability to market participants has not distorted their proper application of anticompetitive state policy remains the domain of "state administrative review." *See id.* at 371-72.

CONCLUSION

Accordingly, the Fourth Circuit's judgment should be reversed, and the Board's petition for review of the FTC's final order should be granted.

Respectfully submitted,

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APPENDIX

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15 U.S.C. § 1 provides:

§ 1 Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 45 provides:

§ 45 Unfair methods of competition unlawful; prevention by Commission

(a) Declaration of unlawfulness; power to prohibit unfair practices; inapplicability to foreign trade

(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.

(2) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions described in section 57a(f)(3) of this title, Federal credit unions described in section 57a(f)(4) of this title, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to part A of subtitle VII of Title 49, and persons, partnerships, or corporations insofar as

they are subject to the Packers and Stockyards Act, 1921, as amended [7 U.S.C.A. § 181 et seq.], except as provided in section 406(b) of said Act [7 U.S.C.A. § 227(b)], from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

(3) This subsection shall not apply to unfair methods of competition involving commerce with foreign nations (other than import commerce) unless—

(A) such methods of competition have a direct, substantial, and reasonably foreseeable effect—

(i) on commerce which is not commerce with foreign nations, or on import commerce with foreign nations; or

(ii) on export commerce with foreign nations, of a person engaged in such commerce in the United States; and

(B) such effect gives rise to a claim under the provisions of this subsection, other than this paragraph.

If this subsection applies to such methods of competition only because of the operation of subparagraph (A)(ii), this subsection shall apply to such conduct only for injury to export business in the United States.

(4)(A) For purposes of subsection (a) of this section, the term "unfair or deceptive acts or practices" includes such acts or practices involving foreign commerce that—

(i) cause or are likely to cause reasonably foreseeable injury within the United States; or

(ii) involve material conduct occurring within the United States.

(B) All remedies available to the Commission with respect to unfair and deceptive acts or practices shall be available for acts and practices described in this paragraph, including restitution to domestic or foreign victims.

(b) Proceeding by Commission; modifying and setting aside orders

Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the

opinion that the method of competition or the act or practice in question is prohibited by this subchapter, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require, except that (1) the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section; and (2) in the case of an order, the Commission shall reopen any such order to consider whether such order

(including any affirmative relief provision contained in such order) should be altered, modified, or set aside, in whole or in part, if the person, partnership, or corporation involved files a request with the Commission which makes a satisfactory showing that changed conditions of law or fact require such order to be altered, modified, or set aside, in whole or in part. The Commission shall determine whether to alter, modify, or set aside any order of the Commission in response to a request made by a person, partnership, or corporation under paragraph[1] (2) not later than 120 days after the date of the filing of such request.

(c) Review of order; rehearing

Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission, and thereupon the Commission shall file in the court the record in the proceeding, as provided in section 2112 of Title 28. Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein

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[1] So in original. Probably should be "clause".

concurrently with the Commission until the filing of the record and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgement to prevent injury to the public or to competitors pendente lite. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 1254 of Title 28.

* * *

N.C. Gen. Stat. § 11-7 provides:

§ 11-7. Oath or affirmation to support Constitutional all officers to take

Every member of the General Assembly and every person elected or appointed to hold any office of trust or profit in the State shall before taking office or entering upon the execution of the office, take and subscribe the following oath:

"I, .,do solemnly and sincerely swear that I will support the Constitution of the United States; that I will be faithful and bear true allegiance to the State of the North Carolina, and to the constitutional powers and authorities which are or may be established for the government thereof; and that I will endeavor to support, maintain and defend the Constitution of said State, not inconsistent with the Constitution of the United States, to the best of my knowledge and ability; so help me God."

N.C. Gen. Stat. § 90-22 provides:

§ 90-22 Practice of dentistry regulated in public interest; Article liberally construed; Board of Dental Examiners; composition; qualifications and terms of members; vacancies; nominations and elections; compensation; expenditures by Board

(a) The practice of dentistry in the State of North Carolina is hereby declared to affect the public health, safety and welfare and to be subject to regulation and control in the public interest. It is further declared to be a matter of public interest and concern that the dental profession merit and receive the confidence of the public and that only qualified persons be permitted to practice dentistry in the

State of North Carolina. This Article shall be liberally construed to carry out these objects and purposes.

(b) The North Carolina State Board of Dental Examiners heretofore created by Chapter 139, Public Laws 1879 and by Chapter 178, Public Laws 1915, is hereby continued as the agency of the State for the regulation of the practice of dentistry in this State. Said Board of Dental Examiners shall consist of six dentists who are licensed to practice dentistry in North Carolina, one dental hygienist who is licensed to practice dental hygiene in North Carolina and one person who shall be a citizen and resident of North Carolina and who shall be licensed to practice neither dentistry nor dental hygiene. The dental hygienist or the consumer member cannot participate or vote in any matters of the Board which involves the issuance, renewal or revocation of the license to practice dentistry in the State of North Carolina. The consumer member cannot participate or vote in any matters of the Board which involve the issuance, renewal or revocation of the license to practice dental hygiene in the State of North Carolina. Members of the Board licensed to practice dentistry in North Carolina shall have been elected in an election held as hereinafter provided in which every person licensed to practice dentistry in North Carolina and residing or practicing in North Carolina shall be entitled to vote. Each member of said Board shall be elected for a term of three years and until his successor shall be elected and shall qualify. Each year there shall be elected two dentists for such terms of three years each. Every three years there shall be elected one dental hygienist for a term of three years. Dental hygienists shall be elected to the

Board in an election held in accordance with the procedures hereinafter provided in which those persons licensed to practice dental hygiene in North Carolina and residing or practicing in North Carolina shall be entitled to vote. Every three years a person who is a citizen and resident of North Carolina and licensed to practice neither dentistry nor dental hygiene shall be appointed to the Board for a term of three years by the Governor of North Carolina. Any vacancy occurring on said Board shall be filled by a majority vote of the remaining members of the Board to serve until the next regular election conducted by the Board, at which time the vacancy will be filled by the election process provided for in this Article, except that when the seat on the Board held by a person licensed to practice neither dentistry nor dental hygiene in North Carolina shall become vacant, the vacancy shall be filled by appointment by the Governor for the period of the unexpired term. No dentist shall be nominated for or elected to membership on said Board, unless, at the time of such nomination and election such person is licensed to practice dentistry in North Carolina and actually engaged in the practice of dentistry. No dental hygienist shall be nominated for or elected to membership on said Board unless, at the time of such nomination and election, such person is licensed to practice dental hygiene in North Carolina and is currently employed in dental hygiene in North Carolina. No person shall be nominated, elected, or appointed to serve more than two consecutive terms on said Board.

(c) Nominations and elections of members of the North Carolina State Board of Dental Examiners shall be as follows:

(1) An election shall be held each year to elect successors to those members whose terms are expiring in the year of the election, each successor to take office on the first day of August following the election and to hold office for a term of three years and until his successor has been elected and shall qualify; provided that if in any year the election of the members of such Board for that year shall not have been completed by August 1 of that year, then the said members elected that year shall take office immediately after the completion of the election and shall hold office until the first of August of the third year thereafter and until their successors are elected and qualified. Persons appointed to the Board by the Governor shall take office on the first day of August following their appointment and shall hold office for a term of three years and until such person's successor has been appointed and shall qualify; provided that if in any year the Governor shall not have appointed a person by August first of that year, then the said member appointed that year shall take office immediately after his appointment and shall hold office until the first of August of the third year thereafter and until such member's successor is appointed and qualified.

(2) Every dentist with a current North Carolina license residing or practicing in North Carolina shall be eligible to vote in elections of dentists to the Board. Every dental hygienist with a current North Carolina license residing or practicing in North Carolina shall be eligible to vote in elections of dental hygienists to the Board. The holding of such a license to practice dentistry or dental hygiene in North Carolina shall constitute registration to vote in such elections. The list of licensed dentists and dental

hygienists shall constitute the registration list for elections to the appropriate seats on the Board.

(3) All elections shall be conducted by the Board of Dental Examiners which is hereby constituted a Board of Dental Elections. If a member of the Board of Dental Examiners whose position is to be filled at any election is nominated to succeed himself, and does not withdraw his name, he shall be disqualified to serve as a member of the Board of Dental Elections for that election and the remaining members of the Board of Dental Elections shall proceed and function without his participation.

(4) Nomination of dentists for election shall be made to the Board of Dental Elections by a written petition signed by not less than 10 dentists licensed to practice in North Carolina and residing or practicing in North Carolina. Nomination of dental hygienists for election shall be made to the Board of Dental Elections by a written petition signed by not less than 10 dental hygienists licensed to practice in North Carolina and residing or practicing in North Carolina. Such petitions shall be filed with said Board of Dental Elections subsequent to January 1 of the year in which the election is to be held and not later than midnight of the twentieth day of May of such year, or not later than such earlier date (not before April 1) as may be set by the Board of Dental Elections: provided, that not less than 10 days' notice of such earlier date shall be given to all dentists or dental hygienists qualified to sign a petition of nomination. The Board of Dental Elections shall, before preparing ballots, notify all persons who have been duly nominated of their nomination.

(5) Any person who is nominated as provided in subdivision (4) above may withdraw his name by written notice delivered to the Board of Dental Elections or its designated secretary at any time prior to the closing of the polls in any election.

(6) Following the close of nominations, there shall be prepared, under and in accordance with such rules and regulations as the Board of Dental Elections shall prescribe, ballots containing, in alphabetical order, the names of all nominees; and each ballot shall have such method of identification, and such instructions and requirements printed thereon, as shall be prescribed by the Board of Dental Elections. At such time as may be fixed by the Board of Dental Elections a ballot and a return official envelope addressed to said Board shall be mailed to each person entitled to vote in the election being conducted, together with a notice by said Board designating the latest day and hour for return mailing and containing such other items as such Board may see fit to include. The said envelope shall bear a serial number and shall have printed on the left portion of its face the following:

"Serial No. of Envelope.....

Signature of Voter .....

Address of Voter .....

(Note: The enclosed ballot is not valid unless the signature of the voter is on this envelope)."

The Board of Dental Elections may cause to be printed or stamped or written on said envelope such additional notice as it may see fit to give. No ballot shall be valid or shall be counted in an election

unless, within the time hereinafter provided, it has been delivered to said Board by hand or by mail and shall be sealed. The said Board by rule may make provision for replacement of lost or destroyed envelopes or ballots upon making proper provisions to safeguard against abuse.

(7) The date and hour fixed by the Board of Dental Elections as the latest time for delivery by hand or mailing of said return ballots shall be not earlier than the tenth day following the mailing of the envelopes and ballots to the voters.

(8) The said ballots shall be canvassed by the Board of Dental Elections beginning at noon on a day and at a place set by said Board and announced by it in the notice accompanying the sending out of the ballots and envelopes, said date to be not later than four days after the date fixed by the Board for the closing of the balloting. The canvassing shall be made publicly and any licensed dentists may be present. The counting of ballots shall be conducted as follows: The envelopes shall be displayed to the persons present and an opportunity shall be given to any person present to challenge the qualification of the voter whose signature appears on the envelope or to challenge the validity of the envelope. Any envelope (with enclosed ballot) challenged shall be set aside, and the challenge shall be heard later or at that time by said Board. After the envelopes have been so exhibited, those not challenged shall be opened and the ballots extracted therefrom, insofar as practicable without showing the marking on the ballots, and there shall be a final and complete separation of each envelope and its enclosed ballot. Thereafter each ballot shall be presented for

counting, shall be displayed and, if not challenged, shall be counted. No ballot shall be valid if it is marked for more nominees than there are positions to be filled in that election: provided, that no ballot shall be rejected for any technical error unless it is impossible to determine the voter's choices or choice from the ballot. The counting of the ballots shall be continued until completed. During the counting, challenge may be made to any ballot on the grounds only of defects appearing on the face of the ballot. The said Board may decide the challenge immediately when it is made or it may put aside the ballot and determine the challenge upon the conclusion of the counting of the ballots.

(9)a. Where there is more than one nominee eligible for election to a single seat:

1. The nominee receiving a majority of the votes cast shall be declared elected.

2. In the event that no nominee receives a majority, a second election shall be conducted between the two nominees who receive the highest number of votes.

b. Where there are more than two nominees eligible for election to either of two seats at issue in the same election:

1. A majority shall be any excess of the sum ascertained by dividing the total number of votes cast for all nominees by four.

2. In the event that more than two nominees receive a majority of the votes cast, the two receiving the highest number of votes shall be declared elected.

3. In the event that only one of the nominees receives a majority, he shall be declared elected and

the Board of Dental Examiners shall thereupon order a second election to be conducted between the two nominees receiving the next to highest number of votes.

4. In the event that no nominee receives a majority, a second election shall be conducted between the four candidates receiving the highest number of votes. At such second election, the two nominees receiving the highest number of votes shall be declared elected.

c. In any election, if there is a tie between candidates, the tie shall be resolved by the vote of the Board of Dental Examiners, provided that if a member of that Board is one of the candidates in the tie, he may not participate in such vote.

(10) In the event there shall be required a second election, there shall be followed the same procedure as outlined in the paragraphs above subject to the same limitations and requirements: provided, that if the second election is between four candidates, then the two receiving the highest number of votes shall be declared elected.

(11) In the case of the death or withdrawal of a candidate prior to the closing of the polls in any election, he shall be eliminated from the contest and any votes cast for him shall be disregarded. If, at any time after the closing of the period for nominations because of lack of plural or proper nominations or death, or withdrawal, or disqualification or any other reason, there shall be (i) only two candidates for two positions, they shall be declared elected by the Board of Dental Elections, or (ii) only one candidate for one position, he shall be declared elected by the Board of Dental Elections, or (iii) no candidate for two

positions, the two positions shall be filled by the Board of Dental Examiners, or (iv) no candidate for one position, the position shall be filled by the Board of Dental Examiners, or (v) one candidate for two positions, the one candidate shall be declared elected by the Board of Dental Elections and one qualified dentist shall be elected to the other position by the Board of Dental Examiners. In the event of the death or withdrawal of a candidate after election but before taking office, the position to which he was elected shall be filled by the Board of Dental Examiners. In the event of the death or resignation of a member of the Board of Dental Examiners, after taking office, his position shall be filled for the unexpired term by the Board of Dental Examiners.

(12) An official list of licensed dentists shall be kept at an office of the Board of Dental Elections and shall be open to the inspection of any person at all times. Copies may be made by any licensed dentist. As soon as the voting in any election begins a list of the licensed dentists shall be posted in such office of said Board and indication by mark or otherwise shall be made on that list to show whether a ballot-enclosing envelope has been returned

(13) All envelopes enclosing ballots and all ballots shall be preserved and held separately by the Board of Dental Elections for a period of six months following the close of an election.

(14) From any decision of the Board of Dental Elections relative to the conduct of such elections, appeal may be taken to the courts in the manner otherwise provided by Chapter 150B of the General Statutes of North Carolina.

(15) The Board of Dental Elections is authorized to make rules and regulations relative to the conduct of these elections, provided same are not in conflict with the provisions of this section and provided that notice shall be given to all licensed dentists residing in North Carolina.

(d) For service on the Board of Dental Elections, the members of such Board shall receive the per diem compensation and expenses allowed by this Article for service as members of the Board of Dental Examiners. The Board of Dental Elections is authorized and empowered to expend from funds collected under the provisions of this Article such sum or sums as it may determine necessary in the performance of its duties as a Board of Dental Elections, said expenditures to be in addition to the authorization contained in G.S. 90-43 and to be disbursed as provided therein.

(e) The Board of Dental Elections is authorized to appoint such secretary or secretaries and/or assistant secretary or assistant secretaries to perform such functions in connection with such nominations and elections as said Board shall determine, provided that any protestant or contestant shall have the right to a hearing by said Board in connection with any challenge of a voter, or an envelope, or a ballot or the counting of an election. Said Board is authorized to designate an office or offices for the keeping of lists of registered dentists, for the issuance and the receipt of envelopes and ballots.

N.C. Gen. Stat. § 90-27 provides:

§ 90-27 Judicial powers; additional data for records

The president of the North Carolina State Board of Dental Examiners, and/or the secretary-treasurer of said Board, shall have the power to administer oaths, issue subpoenas requiring the attendance of persons and the production of papers and records before said Board in any hearing, investigation or proceeding conducted by it. The sheriff or other proper official of any county of the State shall serve the process issued by said president or secretary-treasurer of said Board pursuant to its requirements and in the same manner as process issued by any court of record. The said Board shall pay for the service of all process, such fees as are provided by law for the service of like process in other cases.

Any person who shall neglect or refuse to obey any subpoena requiring him to attend and testify before said Board or to produce books, records or documents shall be guilty of a Class 1 misdemeanor.

The Board shall have the power, upon the production of any papers, records or data, to authorize certified copies thereof to be substituted in the permanent record of the matter in which such books, records or data shall have been introduced in evidence.

N.C. Gen. Stat. § 90-29 provides:

§ 90-29 Necessity for license; dentistry defined; exemptions

(a) No person shall engage in the practice of dentistry in this State, or offer or attempt to do so,

unless such person is the holder of a valid license or certificate of renewal of license duly issued by the North Carolina State Board of Dental Examiners.

(b) A person shall be deemed to be practicing dentistry in this State who does, undertakes or attempts to do, or claims the ability to do any one or more of the following acts or things which, for the purposes of this Article, constitute the practice of dentistry:

(1) Diagnoses, treats, operates, or prescribes for any disease, disorder, pain, deformity, injury, deficiency, defect, or other physical condition of the human teeth, gums, alveolar process, jaws, maxilla, mandible, or adjacent tissues or structures of the oral cavity;

(2) Removes stains, accretions or deposits from the human teeth;

(3) Extracts a human tooth or teeth;

(4) Performs any phase of any operation relative or incident to the replacement or restoration of all or a part of a human tooth or teeth with any artificial substance, material or device;

(5) Corrects the malposition or malformation of the human teeth;

(6) Administers an anesthetic of any kind in the treatment of dental or oral diseases or physical conditions, or in preparation for or incident to any operation within the oral cavity; provided, however, that this subsection shall not apply to a lawfully qualified nurse anesthetist who administers such anesthetic under the supervision and direction of a licensed dentist or physician;

(6a) Expired July 1, 1996.

(7) Takes or makes an impression of the human teeth, gums or jaws;

(8) Makes, builds, constructs, furnishes, processes, reproduces, repairs, adjusts, supplies or professionally places in the human mouth any prosthetic denture, bridge, appliance, corrective device, or other structure designed or constructed as a substitute for a natural human tooth or teeth or as an aid in the treatment of the malposition or malformation of a tooth or teeth, except to the extent the same may lawfully be performed in accordance with the provisions of G.S. 90-29.1 and 90-29.2;

(9) Uses a Roentgen or X-ray machine or device for dental treatment or diagnostic purposes, or gives interpretations or readings of dental Roentgenograms or X rays;

(10) Performs or engages in any of the clinical practices included in the curricula of recognized dental schools or colleges;

(11) Owns, manages, supervises, controls or conducts, either himself or by and through another person or other persons, any enterprise wherein any one or more of the acts or practices set forth in subdivisions (1) through (10) above are done, attempted to be done, or represented to be done;

(12) Uses, in connection with his name, any title or designation, such as "dentist," "dental surgeon," "doctor of dental surgery," "D.D.S.," "D.M.D.," or any other letters, words or descriptive matter which, in any manner, represents him as being a dentist able or qualified to do or perform any one or more of the acts or practices set forth in subdivisions (1) through (10) above;

(13) Represents to the public, by any advertisement or announcement, by or through any media, the ability or qualification to do or perform any of the acts or practices set forth in subdivisions (1) through (10) above.

(c) The following acts, practices, or operations, however, shall not constitute the unlawful practice of dentistry:

(1) Any act by a duly licensed physician or surgeon performed in the practice of his profession;

(2) The practice of dentistry, in the discharge of their official duties, by dentists in any branch of the Armed Forces of the United States or in the full-time employ of any agency of the United States;

(3) The teaching or practice of dentistry, in dental schools or colleges operated and conducted in this State and approved by the North Carolina State Board of Dental Examiners, by any person or persons licensed to practice dentistry anywhere in the United States or in any country, territory or other recognized jurisdiction until December 31, 2002. On or after January 1, 2003, all dentists previously practicing under G.S. 90-29(c)(3) shall be granted an instructor's license upon application to the Board and payment of the required fee.

(4) The practice of dentistry in dental schools or colleges in this State approved by the North Carolina State Board of Dental Examiners by students enrolled in such schools or colleges as candidates for a doctoral degree in dentistry when such practice is performed as a part of their course of instruction and is under direct supervision of a dentist who is either duly licensed in North Carolina or qualified under subdivision (3) above as a teacher; additionally, the

practice of dentistry by such students at State or county institutions with resident populations, hospitals, State or county health departments, area health education centers, nonprofit health care facilities serving low-income populations and approved by the State Health Director or his designee and approved by the Board of Dental Examiners, and State or county-owned nursing homes; subject to review and approval or disapproval by the said Board of Dental Examiners when in the opinion of the dean of such dental school or college or his designee, the students' dental education and experience are adequate therefor, and such practice is a part of the course of instruction of such students, is performed under the direct supervision of a duly licensed dentist acting as a teacher or instructor, and is without remuneration except for expenses and subsistence all as defined and permitted by the rules and regulations of said Board of Dental Examiners. Should the Board disapprove a specific program, the Board shall within 90 days inform the dean of its actions. Nothing herein shall be construed to permit the teaching of, delegation to or performance by any dental hygienist, dental assistant, or other auxiliary relative to any program of extramural rotation, of any function not heretofore permitted by the Dental Practice Act, the Dental Hygiene Act or by the rules and regulations of the Board;

(5) The temporary practice of dentistry by licensed dentists of another state or of any territory or country when the same is performed, as clinicians, at meetings of organized dental societies, associations, colleges or similar dental organizations, or when such dentists appear in emergency cases upon the specific call of a dentist duly licensed to practice in this State;

(6) The practice of dentistry by a person who is a graduate of a dental school or college approved by the North Carolina State Board of Dental Examiners and who is not licensed to practice dentistry in this State, when such person is the holder of a valid intern permit, or provisional license, issued to him by the North Carolina State Board of Dental Examiners pursuant to the terms and provisions of this Article, and when such practice of dentistry complies with the conditions of said intern permit, or provisional license;

(7) Any act or acts performed by a dental hygienist when such act or acts are lawfully performed pursuant to the authority of Article 16 of this Chapter 90 or the rules and regulations of the Board promulgated thereunder;

(8) Activity which would otherwise be considered the practice of dental hygiene performed by students enrolled in a school or college approved by the Board in a board-approved dental hygiene program under the direct supervision of a dental hygienist or a dentist duly licensed in North Carolina or qualified for the teaching of dentistry pursuant to the provisions of subdivision (3) above;

(9) Any act or acts performed by an assistant to a dentist licensed to practice in this State when said act or acts are authorized and permitted by and performed in accordance with rules and regulations promulgated by the Board;

(10) Dental assisting and related functions as a part of their instructions by students enrolled in a course in dental assisting conducted in this State and approved by the Board, when such functions are performed under the supervision of a dentist acting

as a teacher or instructor who is either duly licensed in North Carolina or qualified for the teaching of dentistry pursuant to the provisions of subdivision (3) above;

(11) The extraoral construction, manufacture, fabrication or repair of prosthetic dentures, bridges, appliances, corrective devices, or other structures designed or constructed as a substitute for a natural human tooth or teeth or as an aid in the treatment of the malposition or malformation of a tooth or teeth, by a person or entity not licensed to practice dentistry in this State, when the same is done or performed solely upon a written work order in strict compliance with the terms, provisions, conditions and requirements of G.S. 90-29.1 and 90-29.2.

(12) The use of a dental x-ray machine in the taking of dental radiographs by a dental hygienist, certified dental assistant, or a dental assistant who can show evidence of satisfactory performance on an equivalency examination, recognized by the Board of Dental Examiners, based on seven hours of instruction in the production and use of dental x rays and an educational program of not less than seven hours in clinical dental radiology.

(13) A dental assistant, or dental hygienist who shows evidence of education and training in Nitrous Oxide — Oxygen Inhalant Conscious Sedation within a formal educational program may aid and assist a licensed dentist in the administration of Nitrous Oxide — Oxygen Inhalant Conscious Sedation. Any dental assistant who can show evidence of having completed an educational program recognized by the Board of not less than seven clock hours on Nitrous Oxide — Oxygen Inhalant Conscious Sedation may

also aid and assist a licensed dentist in the administration of Nitrous Oxide — Oxygen Inhalant Conscious Sedation. Any dental hygienist or dental assistant who has been employed in a dental office where Nitrous Oxide — Oxygen Inhalant Conscious Sedation was utilized, and who can show evidence of performance and instruction of not less than one year prior to July 1, 1980, qualifies to aid and assist a licensed dentist in the administration of Nitrous Oxide — Oxygen Inhalant Conscious Sedation.

(14) The operation of a nonprofit health care facility serving low-income populations and approved by the State Health Director or his designee and approved by the North Carolina State Board of Dental Examiners.

N.C. Gen. Stat. § 90-30 provides:

§ 90-30 Examination and licensing of applicants; qualifications; causes for refusal to grant license; void licenses

(a) The North Carolina State Board of Dental Examiners shall grant licenses to practice dentistry to such applicants who are graduates of a reputable dental institution, who, in the opinion of a majority of the Board, shall undergo a satisfactory examination of proficiency in the knowledge and practice of dentistry, subject, however, to the further provisions of this section and of the provisions of this Article.

The applicant for a license to practice dentistry shall be of good moral character, at least 18 years of age at the time the application is filed. The application for a dental license shall be made to the Board in writing and shall be accompanied by

evidence satisfactory to the Board that the applicant is a person of good moral character, has an academic education, the standard of which shall be determined by the Board; that the applicant is a graduate of and has a diploma from a reputable dental college or the dental department of a reputable university or college recognized, accredited and approved as such by the Board; and that the applicant has passed a clinical licensing examination, the standard of which shall be determined by the Board.

The North Carolina State Board of Dental Examiners is authorized to conduct both written or oral and clinical examinations or to accept the results of other Board-approved regional or national independent third-party clinical examinations that shall include procedures performed on human subjects as part of the assessment of restorative clinical competencies and that are determined by the Board to be of such character as to thoroughly test the qualifications of the applicant, and may refuse to grant a license to any person who, in its discretion, is found deficient in the examination. The Board may refuse to grant a license to any person guilty of cheating, deception or fraud during the examination, or whose examination discloses to the satisfaction of the Board, a deficiency in academic or clinical education. The Board may employ such dentists found qualified therefor by the Board, in examining applicants for licenses as it deems appropriate.

The North Carolina State Board of Dental Examiners may refuse to grant a license to any person guilty of a crime involving moral turpitude, or gross immorality, or to any person addicted to the use of alcoholic liquors or narcotic drugs to such an

extent as, in the opinion of the Board, renders the applicant unfit to practice dentistry.

Any license obtained through fraud or by any false representation shall be void ab initio and of no effect.

(b) The Department of Justice may provide a criminal record check to the North Carolina State Board of Dental Examiners for a person who has applied for a license through the Board. The Board shall provide to the Department of Justice, along with the request, the fingerprints of the applicant, any additional information required by the Department of Justice, and a form signed by the applicant consenting to the check of the criminal record and to the use of the fingerprints and other identifying information required by the State or national repositories. The applicant's fingerprints shall be forwarded to the State Bureau of Investigation for a search of the State's criminal history record file, and the State Bureau of Investigation shall forward a set of the fingerprints to the Federal Bureau of Investigation for a national criminal history check. The Board shall keep all information pursuant to this subsection privileged, in accordance with applicable State law and federal guidelines, and the information shall be confidential and shall not be a public record under Chapter 132 of the General Statutes.

The Department of Justice may charge each applicant a fee for conducting the checks of criminal history records authorized by this subsection

N.C. Gen. Stat. § 90-40 provides:

§ 90-40 Unauthorized practice; penalty

If any person shall practice or attempt to practice dentistry in this State without first having passed the examination and obtained a license from the North Carolina Board of Dental Examiners or having obtained a provisional license from said Board; or if he shall practice dentistry after March 31 of each year without applying for a certificate of renewal of license, as provided in G.S. 90-31; or shall practice or attempt to practice dentistry while his license is revoked, or suspended, or when a certificate of renewal of license has been refused; or shall violate any of the provisions of this Article for which no specific penalty has been provided; or shall practice or attempt to practice, dentistry in violation of the provisions of this Article; or shall practice dentistry under any name other than his own name, said person shall be guilty of a Class 1 misdemeanor. Each day's violation of this Article shall constitute a separate offense.

N.C. Gen. Stat. § 90-40.1 provides:

§ 90-40.1 Enjoining unlawful acts

(a) The practice of dentistry by any person who has not been duly licensed so as to practice or whose license has been suspended or revoked, or the doing, committing or continuing of any of the acts prohibited by this Article by any person or persons, whether licensed dentists or not, is hereby declared to be inimical to public health and welfare and to constitute a public nuisance. The Attorney General for the State of North Carolina, the district attorney

of any of the superior courts, the North Carolina State Board of Dental Examiners in its own name, or any resident citizen may maintain an action in the name of the State of North Carolina to perpetually enjoin any person from so unlawfully practicing dentistry and from the doing, committing or continuing of such unlawful act. This proceeding shall be in addition to and not in lieu of criminal prosecutions or proceedings to revoke or suspend licenses as authorized by this Article.

(b) In an action brought under this section the final judgment, if in favor of the plaintiff, shall perpetually restrain the defendant or defendants from the commission or continuance of the act or acts complained of. A temporary injunction to restrain the commission or continuance thereof may be granted upon proof or by affidavit that the defendant or defendants have violated any of the laws or statutes applicable to unauthorized or unlawful practice of dentistry. The provisions of the statutes or rules relating generally to injunctions as provisional remedies in actions shall apply to such a temporary injunction and the proceedings thereunder.

(c) The venue for actions brought under this section shall be the superior court of any county in which such acts constituting unlicensed or unlawful practice of dentistry are alleged to have been committed or in which there appear reasonable grounds to believe that they will be committed, in the county where the defendants in such action reside, or in Wake County.

(d) The plaintiff in such action shall be entitled to examination of the adverse party and witnesses

before filing complaint and before trial in the same manner as provided by law for the examination of the parties.

N.C. Gen. Stat. § 90-41 provides:

§ 90-41 Disciplinary action

(a) The North Carolina State Board of Dental Examiners shall have the power and authority to (i) Refuse to issue a license to practice dentistry; (ii) Refuse to issue a certificate of renewal of a license to practice dentistry; (iii) Revoke or suspend a license to practice dentistry; and (iv) Invoke such other disciplinary measures, censure, or probative terms against a licensee as it deems fit and proper;

in any instance or instances in which the Board is satisfied that such applicant or licensee:

(1) Has engaged in any act or acts of fraud, deceit or misrepresentation in obtaining or attempting to obtain a license or the renewal thereof;

(2) Is a chronic or persistent user of intoxicants, drugs or narcotics to the extent that the same impairs his ability to practice dentistry;

(3) Has been convicted of any of the criminal provisions of this Article or has entered a plea of guilty or nolo contendere to any charge or charges arising therefrom;

(4) Has been convicted of or entered a plea of guilty or nolo contendere to any felony charge or to any misdemeanor charge involving moral turpitude;

(5) Has been convicted of or entered a plea of guilty or nolo contendere to any charge of violation of any state or federal narcotic or barbiturate law;

(6) Has engaged in any act or practice violative of any of the provisions of this Article or violative of any of the rules and regulations promulgated and adopted by the Board, or has aided, abetted or assisted any other person or entity in the violation of the same;

(7) Is mentally, emotionally, or physically unfit to practice dentistry or is afflicted with such a physical or mental disability as to be deemed dangerous to the health and welfare of his patients. An adjudication of mental incompetency in a court of competent jurisdiction or a determination thereof by other lawful means shall be conclusive proof of unfitness to practice dentistry unless or until such person shall have been subsequently lawfully declared to be mentally competent;

(8) Has conducted in-person solicitation of professional patronage or has employed or procured any person to conduct such solicitation by personal contact with potential patients, except to the extent that informal advice may be permitted by regulations issued by the Board of Dental Examiners;

(9) Has permitted the use of his name, diploma or license by another person either in the illegal practice of dentistry or in attempting to fraudulently obtain a license to practice dentistry;

(10) Has engaged in such immoral conduct as to discredit the dental profession;

(11) Has obtained or collected or attempted to obtain or collect any fee through fraud, misrepresentation, or deceit;

(12) Has been negligent in the practice of dentistry;

(13) Has employed a person not licensed in this State to do or perform any act or service, or has aided, abetted or assisted any such unlicensed person to do or perform any act or service which under this Article or under Article 16 of this Chapter, can lawfully be done or performed only by a dentist or a dental hygienist licensed in this State;

(14) Is incompetent in the practice of dentistry;

(15) Has practiced any fraud, deceit or misrepresentation upon the public or upon any individual in an effort to acquire or retain any patient or patients;

(16) Has made fraudulent or misleading statements pertaining to his skill, knowledge, or method of treatment or practice;

(17) Has committed any fraudulent or misleading acts in the practice of dentistry;

(18) Has, directly or indirectly, published or caused to be published or disseminated any advertisement for professional patronage or business which is untruthful, fraudulent, misleading, or in any way inconsistent with rules and regulations issued by the Board of Dental Examiners governing the time, place, or manner of such advertisements;

(19) Has, in the practice of dentistry, committed an act or acts constituting malpractice;

(20) Repealed by Laws 1981, c. 751, § 7.

(21) Has permitted a dental hygienist or a dental assistant in his employ or under his supervision to do or perform any act or acts violative of this Article, or of Article 16 of this Chapter, or of the rules and regulations promulgated by the Board;

(22) Has wrongfully or fraudulently or falsely held himself out to be or represented himself to be qualified as a specialist in any branch of dentistry;

(23) Has persistently maintained, in the practice of dentistry, unsanitary offices, practices, or techniques;

(24) Is a menace to the public health by reason of having a serious communicable disease;

(25) Has distributed or caused to be distributed any intoxicant, drug or narcotic for any other than a lawful purpose; or

(26) Has engaged in any unprofessional conduct as the same may be, from time to time, defined by the rules and regulations of the Board.

(b) If any person engages in or attempts to engage in the practice of dentistry while his license is suspended, his license to practice dentistry in the State of North Carolina may be permanently revoked.

(c) The Board may, on its own motion, initiate the appropriate legal proceedings against any person, firm or corporation when it is made to appear to the Board that such person, firm or corporation has violated any of the provisions of this Article or of Article 16.

(d) The Board may appoint, employ or retain an investigator or investigators for the purpose of examining or inquiring into any practices committed in this State that might violate any of the provisions of this Article or of Article 16 or any of the rules and regulations promulgated by the Board.

(e) The Board may employ or retain legal counsel for such matters and purposes as may seem fit and proper to said Board.

(f) As used in this section the term "licensee" includes licensees, provisional licensees and holders of intern permits, and the term "license" includes license, provisional license, instructor's license, and intern permit.

(g) Records, papers, and other documents containing information collected or compiled by the Board, or its members or employees, as a result of investigations, inquiries, or interviews conducted in connection with a licensing or disciplinary matter, shall not be considered public records within the meaning of Chapter 132 of the General Statutes; provided, however, that any notice or statement of charges against any licensee, or any notice to any licensee of a hearing in any proceeding, shall be a public record within the meaning of Chapter 132 of the General Statutes, notwithstanding that it may contain information collected and compiled as a result of any investigation, inquiry, or interview; and provided, further, that if any record, paper, or other document containing information collected and compiled by the Board is received and admitted into evidence in any hearing before the Board, it shall then be a public record within the meaning of Chapter 132 of the General Statutes.

N.C. Gen. Stat. § 90-48 provides:

§ 90-48 Rules and regulations of Board; violation a misdemeanor

The North Carolina State Board of Dental Examiners shall be and is hereby vested, as an agency of the State, with full power and authority to enact rules and regulations governing the practice of dentistry within the State, provided such rules and

regulations are not inconsistent with the provisions of this Article. Such rules and regulations shall become effective 30 days after passage, and the same may be proven, as evidence, by the president and/or the secretary-treasurer of the Board, and/or by certified copy under the hand and official seal of the secretary-treasurer. A certified copy of any rule or regulation shall be receivable in all courts as prima facie evidence thereof if otherwise competent, and any person, firm, or corporation violating any such rule, regulation, or bylaw shall be guilty of a Class 2 misdemeanor, and each day that this section is violated shall be considered a separate offense.

The Board shall issue every two years to each licensed dentist a compilation or supplement of the Dental Practice Act and the Board rules and regulations, and upon written request therefor by such licensed dentist, a directory of dentists.

N.C. Gen. Stat. § 93B-1 provides:

§ 93B-1 Definitions

As used in this Chapter:

"License" means any license (other than a privilege license), certificate, or other evidence of qualification which an individual is required to obtain before he may engage in or represent himself to be a member of a particular profession or occupation.

"Occupational licensing board" means any board, committee, commission, or other agency in North Carolina which is established for the primary purpose of regulating the entry of persons into, and/or the conduct of persons within, a particular profession or occupation, and which is authorized to

issue licenses; "occupational licensing board" does not include State agencies, staffed by full-time State employees, which as a part of their regular functions may issue licenses.

N.C. Gen. Stat. § 93B-2 provides:

§ 93B-2 Annual reports required; contents; open to inspection; sanction for failure to report

(a) No later than October 31 of each year, each occupational licensing board shall file with the Secretary of State, the Attorney General, and the Joint Regulatory Reform Committee an annual report containing all of the following information:

(1) The address of the board, and the names of its members and officers.

(2) The number of persons who applied to the board for examination.

(3) The number who were refused examination.

(4) The number who took the examination.

(5) The number to whom initial licenses were issued.

(6) The number who applied for license by reciprocity or comity.

(7) The number who were granted licenses by reciprocity or comity.

(7a) The number of official complaints received involving licensed and unlicensed activities.

(7b) The number of disciplinary actions taken against licensees, or other actions taken against nonlicensees, including injunctive relief.

(8) The number of licenses suspended or revoked.

(9) The number of licenses terminated for any reason other than failure to pay the required renewal fee.

(10) The substance of any anticipated request by the occupational licensing board to the General Assembly to amend statutes related to the occupational licensing board.

(11) The substance of any anticipated change in rules adopted by the occupational licensing board or the substance of any anticipated adoption of new rules by the occupational licensing board.

(b) No later than October 31 of each year, each occupational licensing board shall file with the Secretary of State, the Attorney General, the Office of State Budget and Management, and the Joint Regulatory Reform Committee a financial report that includes the source and amount of all funds credited to the occupational licensing board and the purpose and amount of all funds disbursed by the occupational licensing board during the previous fiscal year.

(c) The reports required by this section shall be open to public inspection.

(d) Failure of a board to comply with the reporting requirements of this section by October 31 of each year shall result in a suspension of the board's authority to expend any funds until such time as the board files the required reports. Suspension of a board's authority to expend funds under this subsection shall not affect the board's duty to issue and renew licenses or the validity of any application or license for which fees have been tendered in accordance with law. Each board shall adopt rules establishing a procedure for implementing this

subsection and shall maintain an escrow account into which any fees tendered during a board's period of suspension under this subsection shall be deposited.

N.C. Gen. Stat. § 93B-5 provides:

§ 93B-5 Compensation, employment, and training of board members

(a) Board members shall receive as compensation for their services per diem not to exceed one hundred dollars ($100.00) for each day during which they are engaged in the official business of the board.

(b) Board members shall be reimbursed for all necessary travel expenses in an amount not to exceed that authorized under G.S. 138-6(a) for officers and employees of State departments. Actual expenditures of board members in excess of the maximum amounts set forth in G.S. 138-6(a) for travel and subsistence may be reimbursed if the prior approval of the State Director of Budget is obtained and such approved expenditures are within the established and published uniform standards and criteria of the State Director of Budget authorized under G.S. 138-7 for extraordinary charges for hotels, meals, and convention registration for State officers and employees, whenever such charges are the result of required official business of the Board.

(c) Repealed by Laws 1981, c. 757, § 2.

(d) Except as provided herein board members shall not be paid a salary or receive any additional compensation for services rendered as members of the board.

(e) Board members shall not be permanent, salaried employees of said board.

(f) Repealed by Laws 1975, c. 765, § 1.

(g) Within six months of a board member's initial appointment to the board, and at least once within every two calendar years thereafter, a board member shall receive training, either from the board's staff, including its legal advisor, or from an outside educational institution such as the School of Government of the University of North Carolina, on the statutes governing the board and rules adopted by the board, as well as the following State laws, in order to better understand the obligations and limitations of a State agency:

(1) Chapter 150B, The Administrative Procedure Act.

(2) Chapter 132, The Public Records Law.

(3) Article 33C of Chapter 143, The Open Meetings Act.

(4) Articles 31 and 31A of Chapter 143, The State Tort Claims Act and The Defense of State Employees Law.

(5) Chapter 138A, The State Government Ethics Act.

(6) Chapter 120C, Lobbying.

Completion of the training requirements contained in Chapter 138A and Chapter 120C of the General Statutes satisfies the requirements of subdivisions (5) and (6) of this subsection.

N.C. Gen. Stat. § 120-70.101 provides:

§ 120-70.101 Purpose and powers of Committees

The Joint Legislative Administrative Procedure Oversight Committee has the following powers and duties:

(1) To review rules to which the Rules Review Commission has objected to determine if statutory changes are needed to enable the agency to fulfill the intent of the General Assembly.

(2) To receive reports prepared by the Rules Review Commission containing the text and a summary of each rule approved by the Commission.

(3) Deleted by S.L. 2009-125, § 1, eff. Oct. 1, 2009.

(3a) To review the activities of State occupational licensing boards to determine if the boards are operating in accordance with statutory requirements and if the boards are still necessary to achieve the purposes for which they were created. This review shall not include decisions concerning board personnel matters or determinations on individual licensing applications or individual disciplinary actions.

(4) To review State regulatory programs to determine if the programs overlap, have conflicting goals, or could be simplified and still achieve the purpose of the regulation.

(5) To review existing rules to determine if the rules are necessary or if the rules can be streamlined.

(6) To review the rule-making process to determine if the procedures for adopting rules give the public adequate notice of and information about proposed rules.

(7) To review any other concerns about administrative law to determine if statutory changes are needed.

(8) To report to the General Assembly from time to time concerning the Committee's activities and any recommendations for statutory changes.

RESPONDENT'S BRIEF

No. 13-534

In the Supreme Court of the United States

NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Petitioner is a multi-member board that exercises certain authority over the practice of dentistry in North Carolina. Most of its members are dentists who compete in the market for teeth-whitening services and who are elected by other dentists. In a determination upheld by the court of appeals and not challenged here, the Federal Trade Commission (FTC) concluded that petitioner had engaged in concerted anticompetitive conduct that had the effect of expelling the dentists' would-be competitors from the market for teeth-whitening services. The question presented is as follows:

Whether the court of appeals correctly upheld the FTC's determination that the state-action doctrine did not exempt petitioner's conduct from federal antitrust scrutiny.

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In the Supreme Court of the United States

No. 13-534

NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) is reported at 717 F.3d 359. The opinion of the Federal Trade Commission (FTC or Commission) addressing state-action issues (Pet. App. 34a-68a) is reported at 151 F.T.C. 607. The subsequent merits opinion of the FTC (Pet. App. 69a-155a) is reported at 152 F.T.C. 640. The initial decision of the administrative law judge (ALJ) is reported at 152 F.T.C. 75.

JURISDICTION

The judgment of the court of appeals was entered on May 31, 2013. A petition for rehearing was denied on July 30, 2013 (Pet. App. 156a-157a). The petition for a writ of certiorari was filed on October 25, 2013, and was granted on March 3, 2014. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

This case concerns the application of the "state-action doctrine," an implied exception to the federal antitrust laws. Petitioner contends that the doctrine shields from antitrust scrutiny anticompetitive conduct undertaken by a state board controlled by private market participants who are elected to their positions by other private market participants. The FTC and the court of appeals held that such a board can claim protection under the state-action doctrine only if its conduct is actively supervised by disinterested state officials. The FTC and the court further concluded that such active supervision was lacking here, and that petitioner's conduct violated federal competition law.

1. In a series of decisions beginning with *Parker* v. *Brown*, 317 U.S. 341 (1943), this Court has held that, in appropriate circumstances, the national policy of free competition embodied in the federal antitrust laws gives way to a State's decision to govern a particular market by alternative regulatory means. In *Parker*, the Court concluded that Congress did not intend the Sherman Act, 15 U.S.C. 1 *et seq.*, to reach an agricultural marketing program created pursuant to a California statute that "authorize[d] the establishment, through action of state officials, of programs for the marketing of agricultural commodities produced in the state." 317 U.S. at 346. This Court found "nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." *Id.* at 350-351.

Decisions of this Court since *Parker* have refined and clarified the state-action doctrine to strike an

appropriate balance between deference to the States' regulatory choices and "the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws." *FTC* v. *Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1010 (2013) (*Phoebe Putney*). Restraints on trade directed by a State's legislature or its highest court acting in a legislative capacity are sovereign acts and on that basis alone are exempt from antitrust scrutiny. *Parker*, 317 U.S. at 350-352; *Bates* v. *State Bar of Ariz.*, 433 U.S. 350, 359-360 (1977).[1] "Closer analysis is required," however, "when the activity at issue is not directly that of the legislature or supreme court, but is carried out by others pursuant to state authorization." *Hoover* v. *Ronwin*, 466 U.S. 558, 568 (1984). This Court articulated the general rule for such cases in *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) (*Midcal*). The Court in *Midcal* held that the actions of a non-sovereign are shielded by the state-action doctrine only if they are both (1) taken pursuant to a "clearly articulated and affirmatively expressed * * * state policy" to displace competition, and (2) "actively supervised by the State itself." *Id.* at 105 (citation and internal quotation marks omitted).

This Court has since modified the *Midcal* test for cases involving local governmental entities. Because local governments "are not themselves sovereign, state-action immunity under *Parker* does not apply to them directly." *Phoebe Putney*, 133 S. Ct. at 1010.

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[1] This Court has left open the question "whether the Governor of a State stands in the same position as the state legislature and supreme court for purposes of the state-action doctrine." *Hoover*, 466 U.S. at 568 n.17.

"As with private parties," therefore, "immunity will only attach to the activities of local governmental entities if they are undertaken pursuant to a 'clearly articulated and affirmatively expressed' state policy to displace competition." *Id.* at 1011 (quoting *Community Commc'ns Co.* v. *City of Boulder*, 455 U.S. 40, 52 (1982)). But "because they have less of an incentive to pursue their own self-interest under the guise of implementing state policies," local governments "are not subject to the 'active state supervision requirement.'" *Ibid.* (quoting *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34, 46 (1985) (*Hallie*)).

Like municipalities, most state agencies can ordinarily be presumed to pursue public rather than private interests when they carry out state policies. Accordingly, this Court has stated that, "[i]n cases in which the actor is a state agency, it is likely that active state supervision would also not be required." *Hallie*, 471 U.S. at 46 n.10. The Court observed in the same decision, however, that this relaxation of the *Midcal* standard would not extend to any circumstance involving "state or municipal regulation by a private party." *Ibid.* In such cases, "active state supervision must be shown, even where a clearly articulated state policy exists." *Ibid.*

The Court's insistence on active supervision in any case involving "state or municipal regulation by a private party" reflects a fundamental limitation on the state-action doctrine. No matter how clearly a State speaks, it may not "give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." *Parker*, 317 U.S. at 351; accord, *e.g.*, *Hallie*, 471 U.S. at 39; *Midcal*, 445 U.S. at 104. Thus, while a State has "sig-

nificant power to displace the federal antitrust laws and substitute *its own* regulatory judgments," a State may not "displace the federal antitrust laws and then abandon the market at issue to the unsupervised discretion of private participants." 1A Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 226a, at 180 (4th ed. 2013) (Areeda & Hovenkamp); see *FTC* v. *Ticor Title Ins. Co.*, 504 U.S. 621, 633 (1992) ("[A] State may not confer antitrust immunity on private persons by fiat.").

2. Petitioner, the North Carolina State Board of Dental Examiners, is authorized to regulate the practice of dentistry under North Carolina's Dental Practice Act (DPA), N.C. Gen. Stat. §§ 90-22 *et seq.* (2013). Petitioner is designated by North Carolina law as an "agency of the State." *Id.* § 90-22(b). It is required to comply with the State's Public Records Act (*id.* §§ 132-1 *et seq.*), Administrative Procedure Act (*id.* §§ 150B-1 *et seq.*), and open-meetings law (*id.* §§ 143-318.9 *et seq.*). Pet. App. 41a. Petitioner's members must take an oath of office and submit financial disclosure forms. N.C. Gen. Stat. § 138A-22(a) (2013); Pet. App. 41a. Petitioner is also required to submit an annual report to the Governor, and it is subject to general oversight by a committee of the state legislature. N.C. Gen. Stat. §§ 90-44, 93B-2, 120-70.101(3a) (2013); Pet. App. 41a.

Although petitioner thus possesses some of the formal characteristics of a typical state agency, in other respects it more closely resembles a private trade association. Most significantly, petitioner's constituent members are private actors, a controlling majority of whom are practicing dentists chosen by

other dentists rather than by the public or by any politically accountable state official. Six of petitioner's eight seats are reserved for licensed dentists, who must be "actually engaged in the practice of dentistry." N.C. Gen. Stat. § 90-22(b) (2013); Pet. App. 4a-5a. Because they must be active practitioners while they serve, each dentist-member has a significant financial interest in the business of the profession. Pet. App. 72a. Those dentist-members are nominated and elected by the State's licensed dentists to three-year renewable terms. N.C. Gen. Stat. § 90-22(b) (2013); Pet. App. 4a-5a, 40a. The DPA provides no mechanism for the dentist-members' removal by the Governor or by any other state official.[2] In addition, petitioner is funded exclusively by dues and fees paid by its private licensees. Pet. App. 5a, 72a.

Petitioner's principal activity is the licensing and disciplining of dentists. N.C. Gen. Stat. §§ 90-29, 90-41 (2013); Pet. App. 5a, 72a. Petitioner is authorized to set licensing standards, to examine applicants, and to issue licenses. N.C. Gen. Stat. § 90-30(a) (2013); Pet. App. 5a. If petitioner determines that a dentist has engaged in misconduct or is unfit to practice dentistry, it may suspend, revoke, or refuse to renew the dentist's license, or "[i]nvoke such other disciplinary measures, censure, or probative terms against a licensee as it deems fit and proper." N.C. Gen. Stat. § 90-41 (2013).

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[2] Petitioner's other two members are a licensed dental hygienist, who is elected by the State's other licensed hygienists to a three-year renewable term, and a consumer member appointed by the Governor to a three-year renewable term. N.C. Gen. Stat. 90-22(b) (2013); Pet. App. 4a-5a, 40a.

In addition to regulating the conduct of licensed dentists, the DPA also prohibits unlicensed persons from engaging in specified acts that are deemed to constitute "the practice of dentistry." N.C. Gen. Stat. § 90-29 (2013). In contrast to petitioner's broad authority over its own licensees, however, petitioner has limited power to enforce the DPA's prohibition on unlicensed practice. Under North Carolina law, petitioner "does not have the authority to discipline unlicensed individuals or to order non-dentists to stop violating the [DPA]." Pet. App. 5a-6a, 73a. Instead, petitioner may proceed against non-licensees only by instituting in state court "an action * * * to perpetually enjoin any person from so unlawfully practicing dentistry." N.C. Gen. Stat. § 90-40.1(a) (2013); see Pet. App. 5a. That power is not unique to petitioner; such suits may also be brought by state prosecutors or by "any resident citizen." N.C. Gen. Stat. § 90-40.1(a) (2013).

Finally, petitioner has general authority to promulgate "rules and regulations governing the practice of dentistry within the State." N.C. Gen. Stat. § 90-48 (2013). Those regulations, however, cannot become effective until they are approved by the North Carolina Rules Review Commission. *Id.* § 150B-21.8. The Rules Review Commission is a state agency whose members are appointed by the state legislature. *Id.* § 143B-30.1. It is authorized to reject any rule that exceeds the proposing agency's authority or that is not reasonably necessary to implement the relevant statute. *Id.* § 150B-21.9(a).

3. This case involves petitioner's efforts to exclude non-dentists from the market for teeth-whitening services. Pet. App. 6a-8a.

a. Teeth whitening is a popular cosmetic service generally available from dentists as an in-office treatment or take-home kit; from retail stores selling over-the-counter products directly to consumers; and from non-dentists at salons, malls, and similar locations. Pet. App. 6a. Although all of those methods rely on peroxide, they vary in their price, the immediacy of their results, and their ease of use. Dentists' in-office services are generally quick and effective, but are the most costly alternative. *Ibid.* Over-the-counter products are the least expensive, but their efficacy can vary because they require diligent and repeated application by consumers. *Ibid.* The services of non-dentist providers generally occupy an intermediate level—in terms of cost, convenience, and efficacy—between dentists' in-office services and over-the-counter products. *Id.* at 74a. All of these methods of teeth whitening constitute a single market, with providers competing for customers based on price and other qualities. *Id.* at 74a-75a, 126a-127a.

Dentists in North Carolina began providing teeth-whitening services in the 1990s. Pet. App. 6a. Those services became a substantial source of revenue for many dentists, including petitioner's members. *Id.* at 96a-97a. At least eight of petitioner's ten dentist-members who served during the period at issue here provided teeth-whitening services in their private practices, in some cases earning tens of thousands of dollars. *Ibid.*

In approximately 2003, growing demand for teeth whitening led non-dentist providers to enter the North Carolina market by offering the service at salons, spas, and other venues. Pet. App. 6a, 70a. Those providers "charged significantly less than den-

tists despite achieving similar results." *Id.* at 106a. "Dentists soon began complaining to [petitioner] about the lower prices offered by non-dentists," and petitioner's members "likewise recognized that proliferation of non-dentist teeth whitening operations would adversely affect the income of dentists." *Ibid.*

b. Petitioner responded to dentists' complaints by sending dozens of cease-and-desist orders to non-dentist providers of teeth-whitening services. Pet. App. 6a-7a, 42a, 76a. The orders appeared on official letterhead, stated that teeth whitening constitutes the practice of dentistry under North Carolina law, and "order[ed]" the recipients to cease offering teeth-whitening services. *Id.* at 76a; see, *e.g.*, J.A. 10 ("You are hereby ordered to CEASE AND DESIST any and all activity constituting the practice of dentistry."). Although petitioner had no state-law authority to issue orders to non-dentists, Pet. App. 5a-6a, it "viewed these letters as having the force of law[,] and recipients of these communications had a similar understanding," *id.* at 107a. In many cases, petitioner's letters also warned that the unauthorized practice of dentistry is a misdemeanor subject to criminal prosecution. *Id.* at 76a; see, *e.g.*, J.A. 12. In addition, petitioner sent letters to shopping malls that leased space to teeth-whitening kiosks and to manufacturers and distributors of teeth-whitening products used by non-dentists. Pet. App. 7a, 77a. Those letters asserted that the provision of teeth-whitening services by non-dentists was unlawful, and they urged the third-party recipients to stop doing business with non-dentist providers. *Ibid.*; see, *e.g.*, J.A. 22-23.

Petitioner's actions "successfully expelled non-dentist providers from the North Carolina teeth-

whitening market." Pet. App. 7a-8a; see *id.* at 42a, 77a. That was petitioner's intended result. When it received complaints from dentists, petitioner responded with assurances "that [it] was attempting to shut down * * * non-dentist providers." *Id.* at 7a; see *id.* at 103a-104a (statement by petitioner's Chief Operations Officer that petitioner was "going forth to do battle" with non-dentist providers). Petitioner's two non-dentist members did not participate in any of its actions against non-dentist providers of teeth-whitening services. *Id.* at 75a.

c. The asserted legal basis for petitioner's actions was its determination that teeth-whitening services constitute the practice of dentistry under the DPA. At various times, petitioner's orders relied on some or all of three separate statutory provisions, which defined the practice of dentistry to include "[r]emov[ing] stains, accretions, or deposits from the human teeth," "[t]ak[ing] or mak[ing] an impression of the human teeth," and performing "any of the clinical practices included in the curricula of recognized dental schools." N.C. Gen. Stat. § 90-29(b)(2), (7) and (10) (2013); see, *e.g.*, J.A. 12, 16, 20. All of those provisions were enacted before the development of peroxide-based teeth-whitening in the early 1990s. See N.C. Gen. Stat. § 90-29(b)(2), (7) and (10) (1985); 152 F.T.C. at 106, 162.

Some States have banned or regulated the provision of teeth-whitening services by non-dentists through legislation specifically directed at the practice. See, *e.g.*, Ala. Code § 34-9-6(12) (LexisNexis 2013) ("bleaching of the human teeth"); 225 Ill. Comp. Stat. Ann. § 25/17(11) (West 2014) ("applying teeth whitening materials"); Iowa Code Ann. § 153.13(3)

(West 2014) ("tooth whitening"); Ky. Rev. Stat. Ann. § 313.010(11) (LexisNexis 2011) ("whitening of natural or manufactured teeth"); Mo. Rev. Stat. § 332.366 (2014) ("teeth whitening"); Nev. Rev. Stat. Ann. § 631.215(1)(m) (LexisNexis 2014) ("undertakes to whiten or bleach teeth"); N.H. Rev. Stat. Ann. § 317-A:20(I)(h) (LexisNexis 2013) (same). North Carolina law does not impose any comparably specific prohibition, however, and "North Carolina courts have never concluded that teeth whitening services provided by non-dentists are unlawful." Pet. App. 123a. The determination whether non-dentists in North Carolina may lawfully provide teeth-whitening services therefore requires the interpretation of more generally-worded statutory provisions. By proceeding through unilateral cease-and-desist orders rather than by filing suit as authorized by N.C. Gen. Stat. § 90-40.1(a) (2013), petitioner enforced its interpretation of the statute—and effectively excluded non-dentist competitors from the market—without the involvement of the courts or any disinterested agency of the North Carolina government. Pet. App. 65a-67a.

4. On June 17, 2010, the FTC filed an administrative complaint charging petitioner with violating Section 5 of the Federal Trade Commission Act (FTC Act), 15 U.S.C. 45, by anticompetitively excluding non-dentist providers from the market for teeth-whitening services in North Carolina. Pet. App. 8a, 36a.

a. The FTC denied petitioner's motion to dismiss the complaint under the state-action doctrine. Pet. App. 34a-68a. The FTC's complaint counsel argued that petitioner could not satisfy either prong of the *Midcal* test because it lacked state-law authority to issue cease-and-desist orders to non-dentists and

because its actions were not actively supervised by state officials. *Id.* at 48a. For purposes of resolving petitioner's motion, the Commission "assumed" without deciding that petitioner satisfied the clear-articulation requirement. *Id.* at 47a n.8. The FTC concluded, however, that petitioner "must meet both prongs of the *Midcal* test and that it has failed to show sufficient state supervision." *Id.* at 46a-47a.

The FTC first rejected petitioner's contention that, as a "state agency" under North Carolina law, it was not required to show active supervision. Pet. App. 47a-61a. The Commission acknowledged that, in *Hallie*, this Court had suggested that state agencies are not subject to the active-supervision requirement. *Id.* at 49a. The Commission explained, however, that this Court "has been explicit in applying the antitrust laws to public/private hybrid entities, such as regulatory bodies consisting of market participants." *Ibid.* In particular, the FTC relied on the holding in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), that a state bar's status as "a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members." *Id.* at 791; see Pet. App. 50a-51a.

Rather than relying on petitioner's formal status under state law, the FTC concluded that "the operative factor" in determining whether active supervision is required for a particular entity to claim the state-action exemption is the "degree of confidence that the entity's decision-making process is sufficiently independent from the interests of those being regulated." Pet. App. 49a. The Commission thus held that where, as here, "a state regulatory body" is "controlled by participants in the very industry it purports to regu-

late," it must "satisfy both prongs of *Midcal* to be exempted from antitrust scrutiny." *Id.* at 58a. The Commission further found that the need for active supervision in this case is reinforced by petitioner's "accountability to North Carolina's licensed dentists," who elect petitioner's dentist-members without any involvement by the public or by politically accountable state officials. *Id.* at 59a.

Having found that petitioner was required to satisfy both prongs of the *Midcal* test, the FTC concluded that the requisite active supervision was lacking. Pet. App. 61a-68a. Under this Court's decisions, "the active supervision requirement 'mandates that the State *exercise* ultimate control over the challenged anticompetitive conduct.'" *Id.* at 62a (emphasis added by the FTC) (quoting *Patrick* v. *Burget*, 486 U.S. 94, 101 (1988)). In this case, the Commission found no indication "that a state actor was even aware of [petitioner's] policy toward non-dentist teeth whitening, let alone reviewed or approved it." *Id.* at 65a.

b. After the FTC denied petitioner's motion to dismiss, an ALJ conducted a hearing on the merits. Applying standards from Section 1 of the Sherman Act, 15 U.S.C. 1, as incorporated by Section 5 of the FTC Act, 15 U.S.C. 45, the ALJ concluded that petitioner's concerted action to exclude non-dentists from the market for teeth-whitening services constituted an unreasonable restraint of trade and an unfair method of competition. 152 F.T.C. 75.

c. The FTC upheld the ALJ's decision based on its de novo review of the record. Pet. App. 69a-155a.[3]

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[3] The Commission also declined to reconsider its determination that petitioner's conduct was not exempted by the state-action doctrine. Pet. App. 86a.

The Commission explained that petitioner's conduct consisted of "concerted action excluding a lower-cost and popular group of competitors" from the market for teeth-whitening services. *Id.* at 106a. Applying the rule of reason, the Commission concluded that petitioner's actions harmed competition by "depriv[ing] consumers of choice" and causing "higher prices" for teeth-whitening services. *Id.* at 131a.

The Commission also concluded that petitioner had failed to advance a legitimate procompetitive justification for its actions. Pet. App. 114a-125a. *Inter alia*, the FTC rejected petitioner's contention that its actions were justified by public-safety concerns. The Commission explained that, even if such concerns could legitimize anticompetitive actions that would otherwise violate the antitrust laws, there was no "contemporaneous evidence that the challenged conduct [in this case] was motivated by health or safety concerns" rather than by petitioner's desire to eliminate competition from non-dentist providers. *Id.* at 122a. To the contrary, the FTC observed, petitioner "began issuing cease and desist letters two years before it received any reports of consumer injury" attributable to a non-dentist provider of teeth-whitening services, and it received only a handful of consumer complaints at any point. *Id.* at 122a-123a; see *id.* at 75a. The Commission found that the full record "fail[ed] to substantiate [petitioner's] public safety claims," and it viewed the evidence as indicating instead that "non-dentist provided teeth whitening is a safe cosmetic procedure." *Id.* at 123a.

To remedy petitioner's violation of the FTC Act, the Commission ordered it not to unilaterally issue cease-and-desist orders to non-dentist providers of

teeth-whitening services. Pet. App. 145a-148a. The FTC's order expressly preserved petitioner's ability to threaten litigation and to file court actions for suspected violations of the DPA. *Id.* at 147a-148a.

5. The court of appeals denied petitioner's petition for review. Pet. App. 1a-33a.

a. The court of appeals agreed with the FTC that where, as here, "a state agency is operated by market participants who are elected by other market participants, it is a 'private' actor" for purposes of the state-action doctrine and is therefore "required to satisfy both *Midcal* prongs." Pet. App. 17a. The court explained that active supervision is not required "[w]hen a state agency and its members have the attributes of a public body—such as a municipality—and are subject to public scrutiny." *Id.* at 15a. In such cases, "there is little or no danger that [the agency is] involved in a private [anticompetitive] arrangement." *Ibid.* (quoting *Hallie*, 471 U.S. at 47). The court concluded, however, that "when a state agency appears to have the attributes of a private actor and is taking actions to benefit its own membership," then "both parts of *Midcal* must be satisfied." *Ibid.*

The court of appeals explained that its decision was consistent with *Goldfarb*, and with the Fourth Circuit's own precedent requiring "that a state agency operated by market participants must show active state involvement" to invoke the state-action exemption. Pet. App. 14a-15a (citing *Goldfarb*, 421 U.S. at 791-792, and *Asheville Tobacco Bd. of Trade, Inc.* v. *FTC*, 263 F.2d 502, 509 (4th Cir. 1959)). The court rejected petitioner's reliance on decisions from other circuits holding that particular state agencies were not subject to the active-supervision requirement.

Such decisions, the court explained, did not establish the "bright-line rule that [petitioner] requests" because each depended on a finding that particular features of the state agency at issue made it more analogous to a municipality than to a private party. *Id.* at 16a-17a n.6.

b. On the merits, the court of appeals upheld the Commission's determination that petitioner's conduct violated the FTC Act. Pet. App. 18a-29a. The court explained that it was "hesitant to quickly condemn the actions of professional organizations because 'certain practices by members of a learned profession might survive scrutiny even though they would be viewed as a violation of the Sherman Act in another context.'" *Id.* at 27a (quoting *National Soc'y of Prof'l Eng'rs* v. *United States*, 435 U.S. 679, 686 (1978)). On the facts of this case, however, the court held that substantial evidence supported the Commission's finding that petitioner's exclusion of non-dentists from the market for teeth-whitening services constituted concerted anticompetitive action in violation of the FTC Act. *Id.* at 28a.

c. Judge Keenan concurred. Pet. App. 29a-33a. She stressed that petitioner's members "are elected by other private participants in the market" and suggested that the result might well have been different if petitioner's members were instead "appointed or elected by state government officials." *Id.* at 30a. She also emphasized that, under the state-action doctrine, North Carolina is entitled to prohibit non-dentists from providing teeth-whitening services despite the resulting harms to competition. *Id.* at 32a. She explained, however, that when a State makes such a determination, it "must act as the state itself." *Ibid.*

Where, as here, a restraint on competition is instead imposed by a board of "private dentists elected by other private dentists," a court can have "little confidence that the state itself, rather than a private consortium of dentists, chose to regulate dental health in this manner at the expense of robust competition." *Id.* at 32a-33a.

SUMMARY OF ARGUMENT

The state-action doctrine does not shield petitioner's unsupervised anticompetitive conduct from antitrust scrutiny. That doctrine permits a State to supersede the antitrust laws' fundamental national policy of free competition with an alternative scheme of regulation in the public interest. This Court has long held, however, that a State may not displace the antitrust laws by providing that a particular market will be governed by the unsupervised decisions of private market participants acting with the State's imprimatur. Under these principles, the anticompetitive conduct of a state board controlled by private market participants who are selected by other market participants is exempt from the antitrust laws only if it is supervised by disinterested public officials.

A. Under the first prong of the test established in *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) (*Midcal*), a State can displace the antitrust laws only if it clearly articulates its intent to establish an anticompetitive regulatory program. *Midcal*'s first prong can be satisfied, however, even if the State leaves unresolved important questions about *how* and *to what extent* the free market should be restrained. *Midcal*'s active-supervision requirement ensures that the antitrust laws will give way only if those crucial policy choices

are supervised by disinterested public officials, thereby ensuring "that *particular* anticompetitive conduct has been approved by the State." *FTC* v. *Ticor Title Ins. Co.*, 504 U.S. 621, 637 (1992) (*Ticor*) (emphasis added).

B. The FTC and the court of appeals correctly concluded that petitioner is subject to the active-supervision requirement.

1. This Court has held that municipalities are exempt from the active-supervision requirement because, as compared to private parties, they "have less of an incentive to pursue their own self-interest under the guise of implementing state policies." *FTC* v. *Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1011 (2013). The same logic applies to typical state agencies composed of disinterested public officials. But it does not extend to entities like petitioner, a hybrid board vested with state authority yet dominated by private market participants. Instead, common sense suggests—and experience confirms—that such boards have powerful incentives to restrain competition to benefit their members. And in this case, the need for active supervision is reinforced by the fact that petitioner's dentist-members are elected by, and solely accountable to, other practicing dentists.

2. Neither petitioner's status as a "state agency" under North Carolina law nor its state-law powers and duties provide any sound reason to exempt it from the active-supervision requirement. North Carolina is of course free to classify petitioner as a state agency and to grant it regulatory authority. But those matters of state law do not control the federal antitrust inquiry, which instead turns on the substantive factors relevant to the state-action doctrine. Indeed, this Court

has emphasized that "active state supervision must be shown" in any case involving "state or municipal regulation by a private party." *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34, 46 n.10 (1985).

3. This Court's decisions addressing agencies controlled by market participants confirm that the active-supervision requirement applies here. The fact that an entity controlled by market participants is "a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members." *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 791 (1975). Instead, the Court's decisions addressing such hybrid entities have treated them as essentially private, with the availability of the state-action exemption turning on the presence of active supervision. Contrary to petitioner's contention, *Parker* v. *Brown*, 317 U.S. 341 (1943), did not implicitly establish a contrary rule. This Court's opinion in *Parker* did not even mention the composition of the state commission at issue there, much less address its significance for antitrust purposes. And that commission was in any event far less dominated by participants in the relevant market than is petitioner.

4. This Court's decision in *City of Columbia* v. *Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991), does not support petitioner's position. The Court there held that a governmental body otherwise entitled to the state-action exemption does not lose the exemption based on a case-by-case inquiry into officials' subjective motives or the possibility of misconduct unrelated to the purposes of the antitrust laws. Here, in contrast, the question is whether petitioner is entitled to the state-action exemption in the first in-

stance, and the FTC and the court of appeals correctly focused on the *structural* risk of self-interested behavior by private market participants—the core concern of the Sherman Act.

C. Requiring petitioner to demonstrate active supervision furthers the federalism principles underlying the state-action doctrine. The decisions below do not compel North Carolina to adopt any particular regulatory structure—they merely prescribe the circumstances under which federal law will subordinate itself to a State's sovereign policy choice. Allowing a State to supplant federal law if, but only if, it satisfies specified conditions is an inherent feature of the state-action doctrine, and poses no affront to federalism or state sovereignty. To the contrary, it is petitioner's position that would disserve the federalism principles underlying the state-action doctrine. "Federalism serves to assign political responsibility, not to obscure it." *Ticor*, 504 U.S. at 636. Because petitioner's dentist-members are chosen by other dentists rather than by the public or by any elected official, no official of North Carolina can be held politically accountable for petitioner's unsupervised anticompetitive conduct.

D. Contrary to petitioner's claims, faithful application of *Midcal* in this context will not unduly disrupt state regulatory schemes. The decisions below did not upset any settled understanding on which States could have relied in structuring their regulation of dentistry and other professions. Moreover, although state regulatory boards often include market participants, many States have adopted a variety of structures to provide for supervision of their actions by disinterested state officials.

ARGUMENT

THE STATE-ACTION DOCTRINE DOES NOT SHIELD PETITIONER'S UNSUPERVISED ANTICOMPETITIVE CONDUCT FROM ANTITRUST SCRUTINY

Through the federal antitrust laws, the "Magna Carta of free enterprise," Congress "sought to establish a regime of competition as the fundamental principle governing commerce in this country." *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 398 & n.16 (1978) (*Lafayette*) (citation and internal quotation marks omitted); see *United States* v. *Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972). Under the state-action doctrine established in *Parker* v. *Brown*, 317 U.S. 341 (1943), and its progeny, this vital national policy is "subject to supersession by state regulatory programs." *FTC* v. *Ticor Title Ins. Co.*, 504 U.S. 621, 632-633 (1992) (*Ticor*). "But given the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws, 'state-action immunity is disfavored, much as are repeals by implication.'" *FTC* v. *Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1010 (2013) (*Phoebe Putney*) (quoting *Ticor*, 504 U.S. at 636); accord *Lafayette*, 435 U.S. at 398-400.

The two-part test articulated in *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) (*Midcal*), reflects the balance this Court has struck between the national policy of free competition and deference to state regulation. Under *Midcal* and its progeny, a private actor may claim an exemption from antitrust scrutiny only if its actions are both (1) taken pursuant to a "clearly articulated and affirmatively expressed * * * state policy" to displace competition, and (2) "actively supervised by

the State itself." *Id.* at 105 (citation and internal quotation marks omitted). That standard allows a State to displace market competition with regulation in the public interest, but demands that the State "exercise[] sufficient independent judgment and control so that the details of the [anticompetitive conduct] have been established as a product of deliberate state intervention, not simply by agreement among private parties." *Ticor*, 504 U.S. at 634-635.

Midcal's active-supervision requirement unquestionably applies when a State delegates regulatory authority to an industry association or other private body. See, *e.g.*, *Ticor*, 504 U.S. at 638 (state law authorizing private bureaus to set joint insurance rates for their members); *Midcal*, 445 U.S. at 99-100, 105-106 (state law enforcing prices set by wine producers and distributors). In contrast, this Court has held that active supervision is unnecessary when the relevant actor is a municipality, and it has indicated that the same rule "likely" applies to state agencies. *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34, 46-47 & n.10 (1985) (*Hallie*).

The question presented here is whether the active-supervision requirement applies to a "hybrid" state board that possesses some of the formal characteristics of a state agency, but is dominated by private participants in the regulated market who are elected by other market participants. The Commission and the court of appeals correctly held that such entities cannot claim protection under *Parker* unless their anticompetitive actions are supervised by disinterested state officials. That conclusion follows directly from this Court's decisions holding that private market participants cannot invoke the state-action exemp-

tion unless their anticompetitive conduct is actively supervised by disinterested state officials.

Requiring active supervision in this context ensures that, when a State clearly articulates a policy choice to displace competition in a particular field, but leaves unresolved significant questions regarding the details of that policy's implementation, those interstitial decisions will be made (or at least actively supervised) by persons committed to serving the public interest. It is also the only result consistent with the fundamental principle that the state-action doctrine does not authorize a State to "displace the federal antitrust laws and then abandon the market at issue to the unsupervised discretion of private participants." Areeda & Hovenkamp ¶ 226a, at 180. And by providing that a State may supersede the federal competition laws if, but only if, the implementation of its alternative regulatory policy is actively superintended by disinterested public officials, the decisions below further the principles of federalism and political accountability on which the state-action doctrine is based.

A. The Active-Supervision Requirement Ensures That The State-Action Doctrine Protects Only Conduct Approved By Disinterested Public Officials

There is a "close relation between *Midcal*'s two elements. Both are directed at ensuring that particular anticompetitive mechanisms operate because of a deliberate and intended state policy," and not merely through private agreement. *Ticor*, 504 U.S. at 636.

1. *Midcal*'s first (clear-articulation) element ensures that a State's actions will supersede the antitrust laws only if the State has unambiguously expressed its intent to displace competition. Under this

standard, the mere fact that state law authorizes the challenged conduct "is insufficient." *Phoebe Putney*, 133 S. Ct. at 1012. Instead, "the State must have affirmatively contemplated" that its grant of authority will effect "the displacement of competition." *Ibid.* That test is satisfied only "where the displacement of competition was the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature." *Id.* at 1013.

The clear-articulation requirement thus demands that a State speak clearly when it intends to displace the federal antitrust laws. But once "the State's intent to establish an anticompetitive regulatory program is clear," *Midcal*'s first element is satisfied even if the State "fail[s] to describe the implementation of its policy in detail." *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, 471 U.S. 48, 65 (1985) (*Southern Motor Carriers*). In *Southern Motor Carriers*, for example, the Court held that a state agency's policy allowing motor carriers to submit collective rate proposals satisfied the clear-articulation requirement because a state statute directed the agency to set "just and reasonable rates." *Id.* at 63 (internal quotation marks omitted). The Court explained that, "[a]s long as the State as sovereign clearly intends to displace competition in a particular field with a regulatory structure, the first prong of the *Midcal* test is satisfied," even if the details of the anticompetitive scheme are left to the administering agency. *Id.* at 64.

Similarly in *City of Columbia* v. *Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991) (*Omni Outdoor*), this Court held that a State's grant of zoning authority to a municipality satisfied the clear-

articulation requirement because the suppression of competition was a "'foreseeable result' of what the statute authorize[d]." *Id.* at 373 (citation omitted). The State had neither mandated nor approved the particular zoning regulations adopted by the city. *Id.* at 371. Nonetheless, because the State had empowered the city to enact zoning regulations, and because such regulations have foreseeable anticompetitive effects, the Court found the clear-articulation requirement satisfied. *Id.* at 372-373.

As those decisions illustrate, a state policy to displace competition may be "clearly articulated," for purposes of *Midcal*'s first prong, even though it is phrased in somewhat general terms and its implementation requires significant interstitial choices. *Midcal*'s clear-articulation requirement therefore "cannot alone ensure, as required by [this Court's] precedents, that *particular* anticompetitive conduct has been approved by the State." *Ticor*, 504 U.S. at 637 (emphasis added). To the contrary, a clearly articulated state policy to displace competition may leave open critical questions regarding *how* and *to what extent* the free market should be restrained. Here, for example, the North Carolina legislature clearly articulated its intent to displace competition at least to a degree, by prohibiting persons other than licensed dentists from engaging in specified acts that are deemed to constitute "the practice of dentistry." N.C. Gen. Stat. § 90-29(a) (2013). That state policy choice provides no assurance, however, that either the North Carolina legislature or any other disinterested state official approved (or would approve) petitioner's application of the statute to teeth-whitening services.

2. *Midcal*'s second element complements and supplements the clear-articulation requirement by "mandat[ing] that the State exercise ultimate control over the challenged anticompetitive conduct" before that conduct will be protected by the state-action doctrine. *Patrick* v. *Burget*, 486 U.S. 94, 101 (1988). That standard is satisfied when "state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." *Ibid.* Actual state involvement is required; "[t]he mere potential for state supervision is not an adequate substitute for a decision by the State." *Ticor*, 504 U.S. at 638. In *Ticor*, for example, the Court found an absence of adequate supervision in two statutory schemes under which insurance rates proposed by private parties "became effective unless they were rejected within a set time" by state agencies. *Ibid.* The Court explained that, although the agencies had the authority to supervise the filed rates, they had failed to exercise that authority by actually reviewing the proposed rates and disapproving those that were inconsistent with state policy. *Ibid.*

By requiring state approval of the details of an anticompetitive regulatory scheme, the active-supervision requirement polices the basic distinction drawn by the state-action doctrine. A State may supplant the federal antitrust laws with a program of regulation in the public interest, but it may not "frustrat[e] the national policy in favor of competition by casting a 'gauzy cloak of state involvement' over what is essentially private anticompetitive conduct." *Southern Motor Carriers*, 471 U.S. at 57 (quoting *Midcal*, 445 U.S. at 106)). "Actual state involvement,

not deference to private [anticompetitive] arrangements under the general auspices of state law, is the precondition for immunity." *Ticor*, 504 U.S. at 633. This distinction furthers "the purposes of the Sherman Act and of *Parker*: prohibiting the restriction of competition for private gain but permitting the restriction of competition in the public interest." *Omni Outdoor*, 499 U.S. at 378.

In protecting only regulation in the "public interest," the state-action doctrine does not require a State to meet "some normative standard, such as efficiency, in its regulatory practices." *Ticor*, 504 U.S. at 634. Instead, this Court's precedents constrain the *process* by which the State may regulate if it wishes to displace federal competition law. An exemption is granted only if the particular restraints on competition have been approved by disinterested public officials rather than by interested private parties acting alone. "[T]he analysis asks whether the State has played a substantial role in determining the specifics of the economic policy. The question is not how well state regulation works but whether the anticompetitive scheme is the State's own." *Id.* at 635.

3. Consistent with this understanding, this Court has held that the active-supervision requirement is inapplicable when a municipality is alleged to have engaged in anticompetitive conduct. *Hallie*, 471 U.S. at 46. The Court explained that "the requirement of active supervision serves essentially an evidentiary function" by "ensuring that the actor is engaging in the challenged conduct pursuant to state policy." *Ibid.* "Where a private party is engaging in the anticompetitive activity," active supervision is required because "there is a real danger that he is acting to

further his own interests, rather than the governmental interests of the State." *Id.* at 47. In contrast, when a municipality acts to restrain competition, "there is little or no danger that it is involved in a *private* [anticompetitive] arrangement." *Ibid.*

Although this Court has not definitively resolved the issue, it has indicated that state agencies are also "likely" exempt from the active-supervision requirement. *Hallie*, 471 U.S. at 46 n.10. In most of its applications, such a rule would be consistent with the *Hallie* Court's rationale for exempting municipalities. When (as is typically the case) a state agency is controlled by disinterested officials who are accountable to the public, its actions presumptively reflect a good-faith effort to further the public interest rather than an attempt to advance the officials' private interests. See *id.* at 47. In addition, requiring that a traditional state agency be actively supervised by some *other* state entity would diminish the States' ability to use agency expertise "to deal with problems unforeseeable to, or outside the competence of, the legislature." *Southern Motor Carriers*, 471 U.S. at 64.

B. The FTC And The Court Of Appeals Correctly Held That Petitioner Is Subject To *Midcal*'s Active-Supervision Requirement

In finding the active-supervision requirement applicable to petitioner's anticompetitive conduct, the FTC did not adopt a general rule that state agencies must be actively supervised in order to claim the state-action exemption. Rather, the Commission stated that, "[w]hatever the case may be with respect to state agencies generally, * * * th[is] Court has been explicit in applying the antitrust laws to public/private hybrid entities, such as regulatory bodies

consisting of market participants." Pet. App. 49a. The reasons for exempting municipalities and ordinary state agencies from *Midcal*'s active-supervision requirement do not apply to petitioner, which is controlled by market participants who are accountable to other market participants rather than to the public. Because boards controlled by market participants are prone to restrain competition in furtherance of their members' private interests, the anticompetitive conduct of such entities is not exempt from antitrust scrutiny unless it is actively supervised by disinterested state officials.

Petitioner's status as a state agency for purposes of North Carolina law does not alter that conclusion. Petitioner's classification under the antitrust laws is a question of federal law that turns on the substantive characteristics relevant to the state-action doctrine, not on state-law labels. And this Court's cases addressing similar hybrid entities confirm that petitioner's conduct is exempt from antitrust scrutiny only if it is actively supervised. No decision of this Court supports petitioner's contrary argument.

1. State boards controlled by market participants are subject to the active-supervision requirement because they have strong incentives to restrict competition for the benefit of their members

a. In holding that the active-supervision requirement does not apply to municipalities, the Court in *Hallie* did not rely on the facts that municipalities possess formal public charters and are considered governmental bodies under state law. Rather, the Court found active supervision to be unnecessary because it saw "little or no danger" that municipal officials would restrict competition in order to further

their own private interests "rather than the governmental interests of the State." 471 U.S. at 47. By contrast, petitioner's membership, and thus petitioner itself, is dominated by private actors who participate in the very market in which petitioner acted anticompetitively. Pet. App. 58a-59a. Petitioner's members, moreover, are elected by and accountable to no one but other dentists, who share their interest in suppressing competition from non-dentists. *Id.* at 59a. Thus, with respect to the degree of risk that anticompetitive conduct will be undertaken to serve private ends, petitioner is more closely analogous to a typical private trade association than to a municipality or traditional state regulatory agency.

Those structural features preclude any assurance that petitioner's conduct reflects the State's sovereign will rather than its members' private interests. Numerous cases bear out the commonsense proposition that professional and industry associations "often have economic incentives to restrain competition" that threatens their members' interests. *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, 486 U.S. 492, 500 (1988).[4] State boards dominated by private market participants can likewise be expected to "foster anticompetitive practices for the benefit of [their] members." *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 791 (1975); see, *e.g.*, *id.* at 791-792 & n.21 (minimum

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[4] See also, *e.g.*, *FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. 447, 465-466 (1986); *Arizona* v. *Maricopa Cnty. Med. Soc'y*, 457 U.S. 332, 356-357 (1982); *American Soc'y of Mech. Eng'rs, Inc.* v. *Hydrolevel Corp.*, 456 U.S. 556, 571-572 (1982); *National Soc'y of Prof'l Eng'rs* v. *United States*, 435 U.S. 679, 692-693 (1978); *Fashion Originators' Guild of Am., Inc.* v. *FTC*, 312 U.S. 457, 463-465 (1941).

fee schedule enforced by state bar); *In re Massachusetts Bd. of Registration in Optometry*, 110 F.T.C. 549, 579 (1988) (advertising restrictions adopted by state board "controlled by practicing optometrists who benefit financially from this trade restraint").[5] Indeed, petitioner's own expert acknowledged that "state licensing boards, including dental boards, have a history of enforcing restrictions designed to enhance the income of their licensees at the expense of consumers." Pet. App. 113a; see *id.* at 113a n.14 ("[Petitioner] is concerned about the financial interests of North Carolina dentists.").

The facts of this case illustrate the danger that state boards dominated by market participants will "pursue their own self-interest under the guise of implementing state policies." *Phoebe Putney*, 133 S. Ct. at 1011. As the FTC determined in findings upheld by the court of appeals and not challenged here, petitioner successfully excluded rivals from the market for teeth-whitening services provided by its members and dentist constituents. Pet. App. 7a-8a, 129a-130a. The FTC found no credible evidence supporting petitioner's post hoc claim that its actions were justified by concern for consumers' health and safety, and

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[5] See also, *e.g.*, *In re South Carolina State Bd. of Dentistry*, No. 9311, 2007 WL 2763994 (F.T.C. Sept. 11, 2007) (consent order regarding board's restrictions on the provision of certain services by dental hygienists); *In re Texas Bd. of Chiropractic Exam'rs*, 115 F.T.C. 470 (1992) (consent order prohibiting board from adopting anticompetitive advertising restrictions); *In re Wyoming State Bd. of Chiropractic Exam'rs*, 110 F.T.C. 145 (1988) (same); *In re Louisiana State Bd. of Dentistry*, 106 F.T.C. 65 (1985) (same); see generally Aaron Edlin & Rebecca Haw, *Cartels By Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. Pa. L. Rev. 1093, 1107-1110 (2014) (collecting examples).

there was no "contemporaneous evidence that the challenged conduct was motivated by health or safety concerns." *Id.* at 122a. "Almost all" of the complaints that gave rise to petitioner's cease-and-desist orders came from licensed dentists, "many of whom derived income from teeth whitening services" and "noted [in their complaints] that these non-dentist providers offered low prices." *Id.* at 75a. Indeed, petitioner first sent cease-and-desist orders two years before it became aware of any claim of consumer injury. *Id.* at 122a. And in its efforts to exclude non-dentist rivals from the market, petitioner eventually abandoned any attempt to conduct independent investigations, instead issuing cease-and-desist orders based solely on the complaints it received from dentists. See J.A. 30 ("[W]e would generally just send a cease and desist letter and then have them explain to us the reason why they weren't practicing dentistry.").

b. Because a board dominated by market participants who are accountable to other market participants has strong incentives to take anticompetitive actions to benefit its members, its conduct must be actively supervised in order to qualify for the state-action exemption. That conclusion follows directly from *Hallie*, which explained that the need for active supervision turns on the degree of risk that the actor in question "is acting to further [its] own interests, rather than the governmental interests of the State." 471 U.S. at 47. It is also consistent with the basic purpose of the active-supervision requirement as articulated in *Midcal* and this Court's subsequent decisions. Where, as here, a state policy to displace competition is carried out through a board composed of "private actors only loosely affiliated with the

state," Pet. App. 32a, there can be no assurance that "the details of the [anticompetitive conduct] have been established as a product of deliberate state intervention, not simply by agreement among private parties," *Ticor*, 504 U.S. at 634-635.

Leading commentators agree. They recommend that courts "presum[e] * * * as 'private' [for state-action purposes] any organization in which a decisive coalition (usually a majority) is made up of participants in the regulated market." Areeda & Hovenkamp ¶ 227b, at 226. They also urge that the presumption of private action should "become virtually conclusive where the organization's members making the challenged decision are in direct competition with the [affected rival] and stand to gain from the [rival's] discipline or exclusion." *Ibid.*; see *id.* ¶ 227a, at 225 ("[B]odies engaged in self-regulation of their members' commercial activities need active supervision by a more public body to satisfy the *Midcal* requirements."); Einer Richard Elhauge, *The Scope of Antitrust Process*, 104 Harv. L. Rev. 667, 689 (1991) (explaining that "financially interested action is always 'private action' subject to antitrust review").

c. Petitioner does not deny that state boards dominated by market participants predictably act in their own financial interests. Instead, petitioner asserts (Br. 41-44) that the FTC and the court of appeals erred in relying on this "risk of self-interest" rationale in determining that the active-supervision requirement applies. But the rationale that petitioner describes (Br. 41) as "novel and radical" is drawn directly from this Court's decisions.

In *Patrick*, for example, the Court explained that "[t]he active supervision requirement stems from the

recognition that 'where a private party is engaging in anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State.'" 486 U.S. at 100 (brackets omitted) (quoting *Hallie*, 471 U.S. at 47); see *Ticor*, 504 U.S. at 634 (same). In exempting municipalities from the active-supervision requirement, the Court observed that the applicability of that requirement depends on the "danger that [the entity] is involved in a *private* [anticompetitive] arrangement." *Hallie*, 471 U.S. at 47. And just two Terms ago, the Court reiterated that municipalities are exempt from the active-supervision requirement "because they have less of an incentive to pursue their own self-interest under the guise of implementing state policies." *Phoebe Putney*, 133 S. Ct. at 1011. The link between the active-supervision requirement and the risk of self-interested behavior in the implementation of state policy is thus firmly rooted in this Court's decisions—indeed, the very point of the active-supervision requirement is to guard against that risk. It is petitioner's claim that the inquiry is instead controlled by formal state-law labels that is "novel" and unsupported by precedent.

d. In this case, a decisive coalition of petitioner's members consists of participants in the market petitioner regulates. Pet. App. 4a-5a; N.C. Gen. Stat. 90-22(b) (2013). Indeed, *all* of the members involved in the decisions to exclude non-dentist teeth-whitening providers were practicing dentists—petitioner's two non-dentist members did not participate in the conduct at issue here. Pet. App. 75a. Under this Court's decisions, the inherent risk of self-interested behavior created by this structure provides a sufficient reason

to apply the active-supervision requirement to petitioner's conduct.

As the Commission explained, moreover, the need for active supervision is further reinforced by the fact that, by statute, petitioner's members are elected by and therefore solely accountable to their professional colleagues, most or all of whom potentially benefit from petitioner's anticompetitive policies. Pet. App. 58a-60a; cf. *Printz* v. *United States*, 521 U.S. 898, 922 (1997) (emphasizing the importance of "meaningful Presidential control"—including "the power to appoint and remove"—in ensuring the political accountability of the Executive Branch). That feature distinguishes petitioner from the vast majority of its counterparts in other States, whose members are appointed by the Governor or another disinterested state official.[6]

2. Petitioner's status under North Carolina law does not exempt it from the active-supervision requirement

Petitioner's core argument is that the active-supervision requirement does not apply to a "*bona fide* state agency" that is "charged with state-law powers and duties." Pet. Br. 2, 12, 13, 14, 17, 38, 44, 52, 59. Neither of these attributes provides a sound reason for allowing petitioner to invoke the state-

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[6] In only three other States (Alabama, Oklahoma, and South Carolina) is the state dental board controlled by market participants who are elected by their peers. See Ala. Code § 34-9-40 (LexisNexis 2013); Okla. Stat. Ann. tit. 59, § 328.7(B)-(C) (West 2013); S.C. Code Ann. § 40-15-20 (2013). In North Carolina itself, the great majority of state regulatory boards (51 of 57) are likewise *not* constituted as petitioner is, with the majority of its members accountable only to its regulated market participants. See J.A. 34-108 (collecting North Carolina statutes).

action exemption for conduct that is not actively supervised by disinterested state officials.

a. Petitioner's formal status as a state agency under North Carolina law does not control its treatment under the state-action doctrine. "[F]ederal law determines which bodies require further supervision in order to gain *Parker* immunity," and that inquiry cannot be resolved by "state legislative declarations." Areeda & Hovenkamp ¶ 227a, at 225; see *Hallie*, 471 U.S. at 39 ("The determination that [an entity's] activities constitute state action is not a purely formalistic inquiry."). Therefore, while North Carolina may of course classify petitioner as a "state agency" for any and all state-law purposes for which such a classification is relevant, that designation does not govern the federal antitrust inquiry. Cf. *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 391-392 (1995) (holding that a statute providing that Amtrak is not "an agency or establishment of the United States Government" is "assuredly dispositive" as to "matters that are within Congress's control," but that "it is not for Congress to make the final determination of Amtrak's status as a Government entity" for constitutional purposes).

Petitioner's contrary argument rests on the premise that conduct undertaken by an entity labeled a state agency "is inherently the State's own action" for purposes of the active-supervision requirement. Pet. Br. 25. But that premise cannot be reconciled with this Court's decisions holding that the need for active supervision turns not on whether the State has given its formal imprimatur to the relevant conduct—a requirement that is satisfied whenever a State authorizes and enforces anticompetitive determinations by private parties—but rather on whether the relevant

actor has "an incentive to pursue [its] own self-interest under the guise of implementing state policies." *Phoebe Putney*, 133 S. Ct. at 1011.

Petitioner's position is also inconsistent with the fundamental principle that "a State may not confer antitrust immunity on private persons by fiat." *Ticor*, 504 U.S. at 633. That rule would be easily subverted if the active-supervision requirement could be avoided through nomenclature. In *Midcal*, for example, the State could have avoided antitrust scrutiny for what was "essentially a private price-fixing arrangement" by deeming wine producers and distributors to be state agencies when they set minimum prices. 445 U.S. at 106. Similarly, the States could have reversed the result in *Ticor* by deeming the private "rating bureaus" to be state agencies for rate-setting purposes. 504 U.S. at 637-638. This Court should reject an understanding of the active-supervision requirement that can be so easily evaded.

b. In addition to its formal status as a state agency, petitioner relies (Br. 14) on its possession of "state-law powers and duties," such as the authority to issue regulations and the obligation to submit annual reports and financial disclosure forms. Those features likewise do not justify exempting petitioner from the active-supervision requirement.

The Court in *Hallie* emphasized that, in any case involving "state or municipal regulation by a private party," "active state supervision must be shown, even where a clearly articulated state policy exists." 471 U.S. at 46 n.10. The Court's reference to "state or municipal regulation by a private party" would be an oxymoron if the legislature's conferral of regulatory powers were sufficient by itself to render an entity

"public" for purposes of the active-supervision requirement. The *Hallie* Court's analysis makes clear that an entity's possession of state-law regulatory authority is insufficient to negate its otherwise-private character or to obviate the need for active supervision by disinterested state officials.

The relatively limited constraints imposed by petitioner's ethics and reporting requirements are no substitute for the active supervision required by *Midcal*. As the Commission explained, petitioner's annual reports "provide only aggregate information on the number and disposition of investigations by type, providing no hint as to the underlying substance of any of these matters." Pet. App. 64a. The state ethics commission's review for financial conflicts of interest likewise "does not include an examination of substantive Dental Board policies." *Id.* at 60a n.14. Indeed, it appears that no "state actor was even aware of [petitioner's] policy toward non-dentist teeth whitening." *Id.* at 65a.[7]

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[7] The fact that state officials were not even aware of the conduct at issue here demonstrates the error of petitioner's claim (Br. 15, 43-44) that state administrative law is sufficient to ensure that the anticompetitive activities of self-interested regulatory boards further state policies rather than board members' private interests. Moreover, even if administrative-law constraints were adequate to prevent such boards from violating state law, they still would not serve the purpose of the active-supervision requirement: ensuring that disinterested state officials have "exercised sufficient independent judgment and control" over matters of implementation left open by the state legislature. *Ticor*, 504 U.S. at 634.

3. This Court's decisions addressing agencies controlled by market participants confirm that active supervision is required

This Court's precedents reinforce the conclusion that state agencies controlled by private market participants must satisfy *Midcal*'s active-supervision requirement in order to claim the state-action exemption.

a. This Court's decision in *Goldfarb* provides particularly strong support for the decisions below. Like petitioner, the defendant in *Goldfarb* (the Virginia State Bar) was a "state agency by law," and it invoked the state-action doctrine when it was sued for imposing a minimum-fee schedule for attorneys. 421 U.S. at 790. In rejecting the Bar's claim to an exemption from federal competition law, this Court emphasized that "[t]he fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members." *Id.* at 791. Of particular significance here, the Court noted that "there [wa]s no indication * * * that the Virginia Supreme Court approve[d] the [ethics] opinions" through which the Bar enforced the fee schedule, and the Court suggested that the state-action exemption would have applied if the Virginia Supreme Court had exercised a more active supervisory role. *Ibid.*

Petitioner contends (Br. 49-51) that the denial of the state-action exemption in *Goldfarb* rested exclusively on the absence of what *Midcal* would later characterize as a clearly articulated policy of displacing competition. Petitioner is correct that this Court has since described *Goldfarb* as a case in which clear articulation was lacking. See *Southern Motor Carri-*

ers, 471 U.S. at 60-61. Petitioner is wrong, however, to suggest that a lack of clear articulation was the *sole* basis for this Court's decision. Instead, "immunity was withheld for a number of reasons," and "one of the most significant was the lack of adequate supervision by the relevant state body." Areeda & Hovenkamp, ¶ 221e, at 68; see *Hoover* v. *Ronwin*, 466 U.S. 558, 569 (1984) (citing *Goldfarb* for the proposition that "the degree to which the state legislature or supreme court supervises its representative [is] relevant to the inquiry").

Even more to the point, *Goldfarb* establishes that an entity's status as a state agency "for some limited purposes" does not control its treatment under the state-action doctrine. 421 U.S. at 791. The Court confirmed that understanding in *Hallie*, describing *Goldfarb* as a case that "concerned *private parties*," which "may be presumed to be acting primarily on [their] own behalf." 471 U.S. at 45 (emphasis added). That characterization of the state bar in *Goldfarb*—which is in relevant respects similar to petitioner—confirms that an entity deemed to be a state agency for purposes of state law may nonetheless be treated as a "private" actor for purposes of state-action analysis under the federal antitrust laws.

b. This Court's decision in *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977), further confirms those principles. Like *Goldfarb*, that case involved a state-action defense asserted by a bar that was a state agency under state law. *Id.* at 353 & n.3 (explaining that the Arizona Bar was "create[d] and continue[d] under the direction and control of [the Arizona Supreme] Court" (quoting 17A Ariz. Rev. Stat. Ann. Sup. Ct. R. 27(a) (1973))). The Court held that the Arizona

Bar's conduct in promulgating a disciplinary rule was exempt from the federal antitrust laws under *Parker*. *Id.* at 362-363.

Foreshadowing *Midcal*'s formulation of the requirements for exemption, the Court in *Bates* noted that the Arizona Bar's "disciplinary rules reflect a clear articulation of the State's policy with regard to professional behavior," and that "the rules are subject to pointed re-examination by the policymaker—the Arizona Supreme Court—in enforcement proceedings." 433 U.S. at 362. The Court emphasized that the Bar had acted under the "continuous supervision" of the Arizona Supreme Court, and it stressed the "significan[ce]" of the fact that "the State's supervision [wa]s so active." *Id.* at 361-362. The Court thus treated active supervision as central to the state-action inquiry, notwithstanding the Bar's state-law status as a governmental body. As with *Goldfarb*, moreover, this Court's subsequent decisions have referred to *Bates* as a case "concerning state supervision over *private* parties." *Patrick*, 486 U.S. at 103-104 (emphasis added); see *Community Commc'ns Co.* v. *City of Boulder*, 455 U.S. 40, 51 n.14 (1982) (stating that "the 'active state supervision' criterion" was the basis for the decision in *Bates*). Particularly in combination, *Goldfarb* and *Bates* confirm that state agencies dominated by private market participants are properly treated as private parties, for which the availability of the state-action exemption turns on the presence (or absence) of active supervision by disinterested state officials.

c. Petitioner contends (Br. 21) that the state agency involved in *Parker*—the California Agricultural Prorate Advisory Commission—was controlled by

market participants. Petitioner argues (Br. 21-22) that, because the Court in *Parker* found the state-action doctrine applicable without requiring active supervision of the Advisory Commission by any other state entity, this Court should do the same here. That argument is misconceived.

As petitioner recognizes (Br. 22), the composition of the Advisory Commission was "not even discussed in this Court's opinion" in *Parker*. The Sherman Act issue in *Parker*, moreover, was raised for the first time in this Court and was not addressed by the court below. See *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 585-586 (1976) (opinion of Stevens, J.). Accordingly, this Court apparently did not have before it a meaningful record regarding the operation of the California statute. And because no litigant argued that the Advisory Commission's membership was significant for antitrust purposes, the Court offered no views on that topic. Under these circumstances, there is no merit to petitioner's suggestion that *Parker* implicitly resolved the question presented here more than 70 years ago. See *Webster* v. *Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.").

In any event, petitioner's argument rests on a misunderstanding of the statutory scheme in *Parker*. Petitioner notes that, under the relevant California statute, six of the nine members of the Advisory Commission were required "to be engaged 'in the production of agricultural commodities as their principal occupation.'" Pet. Br. 21-22 (citing 1939 Cal. Stat. 2488, ch. 894 § 3). Relying on that feature of the stat-

ute, petitioner asserts that "a super-majority of the Commission's members were also market participants." *Id.* at 21 (emphasis omitted).

Contrary to petitioner's implication, however, the Advisory Commission was not controlled by participants in the regulated market—in that case, the market for raisins. The California statute provided for separate regulation of each agricultural commodity, see *Parker*, 317 U.S. at 346-347, and further provided that, of the six Advisory Commission members required to be engaged in the production of agricultural commodities, "no two of these shall be appointed as representing the same commodity," 1939 Cal. Stat. 2488, ch. 894 § 3; see John E. Lopatka, *The State of "State Action" Antitrust Immunity: A Progress Report*, 46 La. L. Rev. 941, 948 & n.21 (1986). The statute thus ensured that only a minority of the members of the Advisory Commission would be financially interested in any particular regulated market. In addition, the statute assigned to the California Director of Agriculture, a disinterested state official and an ex officio member of the Advisory Commission, the significant powers of "administering and enforcing the provisions of this act," including the appointment and management of Advisory Commission personnel; the adoption of rules and regulations; the undertaking of investigations and conduct of hearings on the Advisory Commission's behalf; and the supervision of the administration of the marketing programs adopted under the act. 1939 Cal. Stat. 2488-2489, 2500, ch. 894 §§ 3, 4, 6, 22. In light of those protections, the Advisory Commission was far less subject than is petitioner to domination by financially-interested parties. And these features of the scheme at issue in *Parker*

further undermine petitioner's suggestion that this Court's decision implicitly exempted state agencies controlled by market participants from the active-supervision requirement.

4. This Court's decision in Omni Outdoor *does not support petitioner's position*

Petitioner contends (Br. 39-40) that this Court's decision in *Omni Outdoor* "squarely forecloses" any rule that treats a state agency's control by private market participants as a ground for holding the state-action doctrine inapplicable. Petitioner's reliance on *Omni Outdoor* is misplaced. That decision addressed an issue entirely different from the one presented here, and the Court's reasoning supports rather than undermines the Fourth Circuit's ruling in this case.

In *Omni Outdoor*, this Court considered whether anticompetitive municipal conduct that otherwise qualified for a state-action exemption could lose that exemption based on various forms of alleged misconduct by the relevant city officials. *Inter alia*, the Court rejected a proposed exception for cases of "corruption," defined as "encompassing any governmental act 'not in the public interest.'" 499 U.S. at 376 (citation omitted). The Court acknowledged that this approach would have "draw[n] the line of impermissible action in a manner relevant to the purposes of the Sherman Act and of *Parker*: prohibiting the restriction of competition for private gain but permitting the restriction of competition in the public interest." *Id.* at 378. The Court rejected the proposal, however, as too "vague" and "impractical" to be administrable. *Id.* at 377. The Court also rejected a proposed rule that would have denied the *Parker* exemption in cases of "bribery or some other violation of state or federal

law" because such a rule was "unrelated to th[e] purposes" of the Sherman Act. *Id.* at 378. The Court explained that an exception to the state-action doctrine in cases of "unlawful political influence" might in some sense vindicate "principles of good government," but that the antitrust laws are aimed at "condemn[ing] trade restraints" rather than at "combating corruption in state and local governments." *Id.* at 378-379.

Omni Outdoor thus holds that, if a particular governmental body (there, a municipality) is otherwise entitled to invoke the state-action doctrine, its entitlement to that exemption does not depend on a case-by-case judicial inquiry into its officers' subjective motives for particular conduct or into the possibility of misconduct unrelated to the ends of the Sherman Act. In the present case, by contrast, the disputed question is whether petitioner can invoke the state-action doctrine in the first instance, not whether it has forfeited otherwise-available state-action protection through misconduct in a particular case.

In determining that petitioner could not invoke the state-action exemption for conduct that was unsupervised by disinterested North Carolina officials, both the FTC and the Fourth Circuit conducted an objective inquiry into the incentives created by petitioner's composition and its members' method of selection—features established by petitioner's governing statute. They concluded that petitioner's control by practicing dentists, as well as its dentist-members' dependence for election on the votes of other practicing dentists, created a *structural* risk of self-interested behavior. That approach avoided the difficulties of administration that an ex post inquiry into officials' subjective motivations for a particular decision would entail, and

it focused on structural attributes "relevant to the purposes of the Sherman Act and of *Parker*: prohibiting the restriction of competition for private gain but permitting the restriction of competition in the public interest." *Omni Outdoor*, 499 U.S. at 378.

C. Requiring Petitioner To Demonstrate Active Supervision Furthers The Principles Of Federalism Underlying The State-Action Doctrine

Echoed by its amici, petitioner contends (Br. 33-36, 48-49) that the court of appeals' decision improperly interferes with "a State's sovereign choices concerning how to staff and structure its regulatory arms." See Nat'l Governors Ass'n (NGA) Amicus Br. 21-23; W. Va. Amicus Br. 7. That contention lacks merit for several reasons.

1. Most fundamentally, petitioner's reliance (Br. 33-34, 48-49) on precedents such as *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991), and *Nixon* v. *Missouri Municipal League*, 541 U.S. 125 (2004), reflects a misunderstanding of the state-action doctrine. In those cases, the Court considered claims that federal statutes *prohibited* States from taking particular actions related to their own governmental structures. See *Nixon*, 541 U.S. at 128-130 (claim that a federal statute preempted a state law barring municipalities from offering telecommunications services); *Gregory*, 501 U.S. at 455 (claim that a mandatory retirement age for state judges violated the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*). In that context, the Court has applied a presumption that Congress does not intend to intrude on the State's prerogatives. See *Nixon*, 541 U.S. at 140-141; *Gregory*, 501 U.S. at 460-461. But *Midcal*'s active-supervision component imposes no comparable legal

obligation or prohibition on the States. Rather, *Midcal* simply establishes the conditions under which federal law—ordinarily supreme in our system, see U.S. Const. Art. VI, Cl. 2—will subordinate itself to a State's sovereign policy choice. See *Ticor*, 504 U.S. at 632-633 (the state-action doctrine renders the antitrust laws "subject to supersession by state regulatory programs"). And in this context, the presumption runs in the opposite direction: this Court has repeatedly held that "'state-action immunity is disfavored, much as are repeals by implication.'" *Phoebe Putney*, 133 S. Ct. at 1010 (quoting *Ticor*, 504 U.S. at 636).

Nothing in the decisions below suggests that North Carolina is required to exercise any particular degree of supervision over petitioner or its members. Rather, if a State chooses not to supervise the conduct of particular private actors, including self-interested individuals vested with a degree of government power, the only consequence is that those actors' conduct will be subject to the same federal competition-law requirements and prohibitions that apply to private conduct generally. Allowing a State to supplant federal law if, but only if, it satisfies specified conditions is not an affront to federalism; it is an example of federalism in action.

Indeed, the *Parker* doctrine necessarily conditions the availability of the state-action exemption on a State's use of certain procedures. Under *Midcal*'s first prong, a state legislature or supreme court can displace competition only if it clearly articulates its intent to do so—the State cannot leave that basic policy choice to state agencies or its political subdivisions. See *Southern Motor Carriers*, 471 U.S. at 63. It is similarly uncontested that, under *Midcal*'s active-

supervision requirement, a State may not displace federal antitrust law if it delegates regulatory authority to unsupervised private parties, or if it fails to exercise its authority to supervise private conduct. See *Ticor*, 504 U.S. at 638-639. Just as those aspects of the state-action doctrine create no affront to state sovereignty or to federalism values, there is nothing improper about requiring, as a prerequisite to the state-action exemption, that the State actively supervise a hybrid board of self-interested market participants.

2. The decisions below leave States free to choose among a variety of regulatory structures according to their judgment about sound governance. If a State constitutes regulatory entities in the way that most traditional state agencies are constituted—with disinterested state officials who are accountable to the public—such entities will "likely" be exempt from federal antitrust law whether or not they are actively supervised by other state officials. See *Hallie*, 471 U.S. at 46 n.10. Alternatively, a State may staff such entities with self-interested market participants and empower them to exclude rivals, while providing appropriate supervision by disinterested officials to ensure that such anticompetitive exclusion indeed reflects state policy. Finally, a State may endow competitor-controlled boards with substantial discretion to administer its broadly articulated policies, and still opt *not* to provide any active supervision, on the understanding that federal antitrust law will provide the necessary deterrent to anticompetitive conduct. Cf. *Ticor*, 504 U.S. at 635-636 ("States regulate their economies in many ways not inconsistent with the antitrust laws.").

3. Petitioner's argument also ignores one of the defining characteristics of our federal system: an appropriate allocation of political accountability. "Federalism serves to assign political responsibility, not to obscure it." *Ticor*, 504 U.S. at 636. Accordingly, this Court has emphasized that, when States "choose to displace the free market with regulation," "insistence on real compliance with both parts of the *Midcal* test will serve to make clear that the State is responsible for the [anticompetitive conduct] it has sanctioned and undertaken to control." *Ibid.* Petitioner's argument would achieve exactly the opposite result, in derogation of the very federalism principles on which it purports to rely. Because petitioner's dentist-members are chosen by dentists alone, rather than by the general public or by elected officials, no official of North Carolina can be held politically accountable for the anticompetitive conduct at issue here. As the Commission explained, "absent antitrust to police their actions, unsupervised self-interested boards would be subject to neither political nor market discipline to serve consumers' best interests." Pet. App. 54a.

4. Petitioner's claim of an intrusion on state prerogatives rings particularly hollow in this case, where petitioner ran afoul of the federal antitrust laws by issuing cease-and-desist orders that exceeded its state-law authority. See Pet. App. 5a-6a, 71a, 73a. Under North Carolina law, petitioner could have proceeded against non-dentist providers of teeth-whitening services by seeking injunctions from the North Carolina courts. N.C. Gen. Stat. § 90-40.1(a) (2013); Pet. App. 5a. Had it done so, petitioner would have been shielded from antitrust liability under the *Noerr-Pennington* doctrine, which provides that

"[t]hose who petition the government for redress"—including by instituting legal proceedings—"are generally immune from antitrust liability." *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Indus., Inc.*, 508 U.S. 49, 56 (1993). That approach would have left to disinterested judicial officials the ultimate determination whether North Carolina law actually prohibits non-dentists from providing teeth-whitening services. Petitioner "did not choose this path," however, but instead "evaded judicial review of its decision to classify teeth whitening as the practice of dentistry by proceeding directly to issue cease and desist orders purporting to enforce that unsupervised decision." Pet. App. 67a.

Alternatively, petitioner could have promulgated a rule that defined, at a finer level of detail than does the DPA itself, the categories of services that constitute the "practice of dentistry" under North Carolina law. N.C. Gen. Stat. § 90-29 (2013). If petitioner had pursued that course, its action would have been subject to review and approval by the disinterested officials of the Rules Review Commission—a form of supervision that "might constitute adequate supervision for state action purposes." Pet. App. 67a. But petitioner "chose to forgo these formal means to address non-dentist teeth whitening." *Ibid.*

Application of the active-supervision requirement to petitioner's activities thus reflects no disrespect for any sovereign decision of the State of North Carolina. With respect to enforcement of state-law restrictions on the practice of dentistry by unlicensed persons, the North Carolina legislature conferred on petitioner limited powers, the exercise of which is subject to review by disinterested state officials. The active-

supervision requirement thus would likely have been satisfied if petitioner had exercised one of the powers that state law actually grants it. No North Carolina statute provides for analogous review by disinterested officials of cease-and-desist orders issued by petitioner unilaterally. The obvious explanation for that omission, however, is that petitioner lacks state-law authority to issue such orders in the first place. See Pet. App. 5a-6a (petitioner "does not have the authority to discipline unlicensed individuals or to order non-dentists to stop violating the [DPA]"); *id.* at 71a, 73a (same).

Petitioner was thus subject to antitrust scrutiny only because it chose not to exercise the powers granted to it under North Carolina law, and instead utilized coercive measures that state law did not authorize. And because the practical effect of the FTC's order was simply to bar petitioner from taking actions that were ultra vires under state law, that order effected no intrusion on state prerogatives. To the contrary, North Carolina's policy choices would be frustrated rather than furthered if the State's decision to vest market participants with limited governmental authority, subject to review by disinterested state officials, were construed to insulate petitioner's unauthorized and unsupervised conduct from federal antitrust scrutiny. Cf. *Phoebe Putney*, 133 S. Ct. at 1016 ("[F]ederalism and state sovereignty are poorly served by a rule of construction that would allow 'essential national policies' embodied in the antitrust laws to be displaced by state delegations of authority 'intended to achieve more limited ends.'") (quoting *Ticor*, 504 U.S. at 636)).

D. Faithful Application Of *Midcal* To State Boards Controlled By Market Participants Will Not Unduly Disrupt State Regulation

Petitioner and its amici contend that affirming the decisions below would have disruptive consequences. They argue that the States have relied on the purported absence of an active-supervision requirement to create regulatory bodies dominated by market participants. See Pet. Br. 3-5, 17, 58; Am. Dental Ass'n Amicus Br. 19-29; Cal. Optometric Ass'n Amicus Br. 2-6; Nat'l Council of Exam'rs for Eng'g & Surveying Amicus Br. 15-21; Fed'n of State Bds. of Physical Therapy Amicus Br. 10-16; N.C. Bar Amicus Br. 11-23; NGA Amicus Br. 12-15, 28-30; W. Va. Amicus Br. 12-17. Both the premise and the conclusion of that argument are mistaken.

1. Petitioner and its amici portray the decision below as a departure from a settled understanding that state agencies composed of market participants may claim an exemption under *Parker* without demonstrating active supervision. As evidence of this supposed consensus, petitioner principally relies (Br. 3-5, 32, 58) on two decisions, *Earles* v. *State Board of Certified Public Accountants of Louisiana*, 139 F.3d 1033 (5th Cir.), cert. denied, 525 U.S. 982 (1998), and *Hass* v. *Oregon State Bar*, 883 F.2d 1453 (9th Cir. 1989), cert. denied, 494 U.S. 1081 (1990). As the court below explained, however, the Fifth and Ninth Circuits in those cases relied on the particular features of the regulatory boards at issue and did not establish any "bright-line rule." Pet. App. 16a-17a n.6; see *Earles*, 139 F.3d at 1041; *Hass*, 883 F.2d at 1460. More fundamentally, even if *Earles* and *Hass* had endorsed the sweeping proposition that petitioner advocates, two

appellate decisions would scarcely justify the degree of reliance that petitioner and its amici claim.

Any such reliance would have been particularly unjustified given the existence of other authorities—including this Court's decisions in *Goldfarb* and *Bates*—strongly indicating that regulatory boards controlled by market participants are subject to the active-supervision requirement. See, *e.g.*, *Washington State Elec. Contractors Ass'n, Inc.* v. *Forrest*, 930 F.2d 736, 737 (9th Cir.) (per curiam) (state council "may not qualify as a state agency" because it had "both public and private members"), cert. denied, 502 U.S. 968 (1991); *FTC* v. *Monahan*, 832 F.2d 688, 689-690 (1st Cir. 1987) (applicability of active-supervision requirement to state pharmacy board "depends upon how the Board functions in practice, and perhaps upon the role played by its members who are private pharmacists"), cert. denied, 485 U.S. 987 (1988); *Asheville Tobacco Bd. of Trade, Inc.* v. *FTC*, 263 F.2d 502, 509-510 (4th Cir. 1959) (*Parker* allows States to grant regulatory authority to market participants only if "their activities are adequately supervised by independent state officials"). That has long been the position of the leading antitrust treatise. See Areeda & Hovenkamp ¶ 227b, at 226. And even where state agencies are controlled by disinterested officials rather than by market participants, this Court has not definitively held that the active-supervision requirement is inapplicable. See *Hallie*, 471 U.S. at 46 n.10 ("In cases in which the actor is a state agency, it is likely that active state supervision would also not be required, although we do not here decide that issue.").

2. Petitioner and its amici are also mistaken in implying that petitioner's unsupervised conduct in this

case is typical of the activities of state regulatory boards. In fact, most States have established schemes to supervise some or all of the conduct of self-interested dental boards. In at least 16 States, either the dental regulatory board is housed within an umbrella state agency that has supervisory authority over dental and other occupational licensing boards, or else the dental board performs primarily advisory functions, with decisions concerning the regulation of dentistry assigned to independent state officials.[8] In at least 15 of the remaining States—including North Carolina—regulations adopted by the dental board must be approved by another state body to become effective or are subject to review and disapproval by disinterested officials.[9] And in at least nine additional

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[8] See Colo. Rev. Stat. § 12-35-104(1)(a) (2013); Conn. Gen. Stat. Ann. § 19a-14(a)(4) (West 2014); Conn. Gen. Stat. Ann. § 20-103a(a) (West 2008); Del. Code Ann. tit. 29, § 8735 (2012); Fla. Stat. Ann. § 466.004 (West 2014); Fla. Stat. Ann. §§ 456.004, 456.012 (West 2013); Haw. Rev. Stat. Ann. § 26-9(c) (LexisNexis 2013); 225 Ill. Comp. Stat. Ann. § 25/7 (West 2014); Mass. Ann. Laws ch. 13, § 9 (LexisNexis 2012); Mass. Ann. Laws ch. 112, § 1 (LexisNexis 2004); Mich. Comp. Laws Ann. § 333.16621 (West 2008); Neb. Rev. Stat. Ann. § 38-167(1)(g) (LexisNexis 2013); Neb. Rev. Stat. Ann. §§ 38-126, 38-161(2) (LexisNexis 2008); N.J. Stat. Ann. §§ 45:1-14, 45:1-17(b) (West 2004); N.Y. Educ. Laws §§ 6504, 6508, 6603 (McKinney 2010); R.I. Gen. Laws § 5-31.1-2(a) (2013); S.C. Code Ann. § 40-1-40 (2011); S.D. Codified Laws §§ 1-26-4(2), 36-6A-6 (2004); Utah Code Ann. §§ 58-1-202, 58-1-203, 58-69-201(3)(a) (LexisNexis 2012); Va. Code Ann. §§ 54.1-2503, 54.1-2505 (2013).

[9] See Ariz. Rev. Stat. Ann. § 41-1052 (2013); Cal. Gov't Code § 11349.1 (West 2014); Ind. Code Ann. §§ 4-22-2-31 to 4-22-2-34 (LexisNexis 2008); Kan. Stat. Ann. §§ 77-420, 77-421 (1997); La. Rev. Stat. Ann. § 49:968 (2014); La. Rev. Stat. Ann. §§ 49:969, 49:970 (2003); Md. Code Ann., Health-Gen. §§ 2-104(b)(3)(ii), 2-106(a) (LexisNexis 2009); Minn. Stat. Ann. § 14.05(6) (West 2013); Nev. Rev. Stat. Ann.

States, legislative committees or other officials are empowered to review regulations, to recommend that the legislature override them, and in some cases to suspend the operation of such regulations pending the legislature's action.[10]

Whether a particular regulatory board's actions require supervision will depend on the features of that board, and whether adequate supervision has actually been provided in a given case will depend on the practical operation of the relevant legal scheme. But the existence of myriad ways in which the States can—and do—structure their regulatory regimes to provide supervision for boards composed of market participants suggests that petitioner and its amici greatly overstate the disruptive effect of the decisions below.

3. Some amici also argue that the decisions below might make professionals reluctant to serve on state regulatory boards because of the increased threat of antitrust suits. See, *e.g.*, Am. Dental Ass'n Amicus Br. 23-25; NGA Amicus Br. 18-21. This Court has heard and rejected similar arguments before. In *Patrick*, various medical associations argued that the state-action doctrine should shield hospital peer-review

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§§ 233B.067, 233B.0675 (LexisNexis 2013); N.C. Gen. Stat. §§ 150B-21.8(b), 150B-21.9(a) (2013); N.D. Cent. Code § 28-32-14 (2006); Okla. Stat. Ann. tit. 75, § 308 (West 2013); Tenn. Code Ann. § 4-5-211 (2011); Wash. Rev. Code Ann. § 18.130.065 (West 2005); W. Va. Code Ann. §§ 29A-3-12 to 29A-3-13 (LexisNexis 2012); Wis. Stat. Ann. § 227.185 (West 2013).

[10] Ala. Code §§ 41-22-23, 41-22-24 (LexisNexis 2013); Alaska Stat. § 24.20.460 (2012); Ga. Code Ann. § 50-13-4(f) (2013); Idaho Code Ann. §§ 67-454, 67-5223, 67-5291 (2014); Iowa Code Ann. § 17A.4 (West 2014); Me. Rev. Stat. Ann. tit. 5, §§ 8071-8072 (2013); Ohio Rev. Code Ann. § 119.03(H)-(I) (LexisNexis 2014); 71 Pa. Cons. Stat. Ann. §§ 745.6, 745.7 (West 2012); Vt. Stat. Ann. tit. 3, § 842 (2010).

boards from antitrust scrutiny, on the grounds "that effective peer review is essential to the provision of quality medical care and that any threat of antitrust liability will prevent physicians from participating openly and actively in peer-review proceedings." 486 U.S. at 105. The Court responded that "[t]his argument * * * essentially challenges the wisdom of applying the antitrust laws to the sphere of medical care, and as such is properly directed to the legislative branch." *Ibid.* The policy arguments presented in this case are similarly misdirected.

In addition, petitioners' amici likely exaggerate the threat of antitrust liability for members of professional boards. Boards that are merely advisory or that are adequately supervised will typically enjoy state-action protection. Even where the prerequisites for an exemption are absent, "finding lack of 'state action' immunity does not prove the violation." Areeda & Hovenkamp ¶ 221a, at 48. "Indeed, the great majority of practices found non-immune are undoubtedly not antitrust violations to begin with." *Ibid.* And because this case does not involve any question of damages, the Court need not address the circumstances under which a state board or board member found liable for an antitrust violation might be immune from damages liability. Cf. *Goldfarb*, 421 U.S. at 792 n.22 (declining to decide whether the Virginia State Bar could assert sovereign immunity under the Eleventh Amendment); *Affiliated Capital Corp.* v. *City of Hous.*, 735 F.2d 1555, 1568-1570 (5th Cir. 1984) (applying qualified immunity to a private antitrust claim against a government official), cert. denied, 474 U.S. 1053 (1986).[11]

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[11] Some amici argue that state agencies are not "persons, partnerships or corporations" under Section 5(a)(2) of the FTC Act, 15

* * * * *

Far from disrupting established understandings, the decision below simply applied the well-settled rule that private market participants cannot invoke the state-action exemption unless their anticompetitive conduct is actively supervised by disinterested state officials. Petitioner contends that this rule should give way when the market participants in question have been designated as a state agency and have been vested with a degree of governmental power. That argument is not supported by any holding of this Court, and it is inconsistent with the Court's stated rationales for requiring active supervision of private but not public actors. Petitioner's claim of intrusion on state prerogatives rings particularly hollow in this case, where its dentist-members engaged in anticompetitive conduct that North Carolina law did not authorize, thereby evading the meaningful oversight by disinterested state officials that would have occurred if petitioner had exercised powers actually granted by the legislature.

U.S.C. 45(a)(2), and that the FTC therefore lacked authority to adjudicate a claim against petitioner. See Am. Dental Ass'n Br. 16-19. That argument, which petitioner has not pressed and which therefore is not properly before this Court, was rightly rejected by the court of appeals. Pet. App. 9a n.2.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted.

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JULY 2014

REPLY BRIEF

No. 13-534

In the Supreme Court of the United States

THE NORTH CAROLINA STATE BOARD
OF DENTAL EXAMINERS,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

In its opening brief, the Board demonstrated that a *bona fide* state agency's enforcement of clearly articulated state policy to displace competition is a sovereign act of state regulation that federal antitrust law does not restrain. The Board further demonstrated that this well-established legal rule of state-action antitrust immunity fully applies where, as here, a State decides that the regulatory agency shall be led by part-time public officials who are also market participants in their private capacities.

In response, the FTC argues that public officials who are also market participants should receive immunity only if their regulatory conduct has been actively supervised by "disinterested" superiors. The FTC reasons that there is too much risk that such "self-interested" regulatory officials will subordinate the public interest to their own private interests, no differently than private businesspeople might. But that argument contravenes this Court's precedents and the principles of federalism that informed them.

Specifically, the state-action antitrust doctrine:

(1) adopts legal precepts that render irrelevant the private interests of public officials;

(2) grants immunity in factual situations where public officials have financial self-interests;

(3) emphasizes that federalism gives States the freedom to choose whether and how to bear the risk that conflicts of interest might affect their officials' regulatory actions; and

(4) requires States to actively supervise only private business conduct, not public regulatory conduct.

This Court should reaffirm those settled propositions and reject the FTC's radical departure from 70 years of precedent.

I. A STATE'S PUBLIC OFFICIALS NEED NOT BE "DISINTERESTED" TO CLAIM STATE-ACTION ANTITRUST IMMUNITY FOR THEIR REGULATORY ACTS

The FTC argues (Br. 27) that the state-action "exemption is granted only if the particular restraints on competition have been approved by disinterested public officials." But two of this Court's precedents are directly to the contrary. Moreover, the FTC misunderstands why this Court has required active state supervision of private actors. No decision of this Court justifies the FTC's position.

A. The FTC's Position Is Irreconcilable With *Parker* And *Omni*

Parker v. Brown, 317 U.S. 341 (1943), and *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991), articulated federalism-based rules of state-action immunity that render the "self-interest" of public officials legally irrelevant. Moreover, the cases granted immunity to public officials who were not factually "disinterested."

1. *Parker's* legal reasoning. *Parker* concluded that the Sherman Act does not "restrain a state or its officers or agents from activities directed by its legislature": (a) the Act "gives no hint" that it was intended to extend beyond "business combinations ... by individuals and corporations" to reach "state action or official action directed by a state"; and (b) courts should "not ... lightly attribute[ ] to Congress" such "an unexpressed purpose" given that "the states are sovereign." 317 U.S. at 350-51; *see also* Pet. Br.

19-21. Importantly, *Parker* did not include any qualification that the State's "officers" who are enforcing anticompetitive regulatory programs "directed by its legislature" must be *disinterested*. Such a condition would have contradicted *Parker's* federalism-based rationale. Pet. Br. 23-25, 33-34.

Remarkably, the FTC's short (and belated) discussion of *Parker* (Br. 41-44) never tries to reconcile the FTC's "disinterested official" argument with *Parker's* core precept that federal antitrust law does not restrain a State's officers when they enforce a state policy to displace competition with regulation. Rather, the FTC suggests that *Parker* was modified by *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), which supposedly "refined and clarified" *Parker* "to strike an appropriate balance" between state sovereignty and free markets. *See* Br. 2-3. But *Parker's* central holding was not limited by *Midcal*, which merely synthesized "decisions [that] ha[d] applied *Parker's* analysis." 445 U.S. at 104-05.

Specifically, *Midcal* involved "private parties" whom the State had "simply authorize[d]" to engage in legally-enforceable price fixing. *Id.* at 105-06. In adopting the active-supervision standard for such state-sanctioned *business conduct by private actors*, *Midcal* implemented the admonition in *Parker* and its progeny that States cannot simply "give immunity to those who violate the Sherman Act by authorizing them to violate it." *Id.* at 106 (quoting *Parker*, 317 U.S. at 351). *Midcal* did not in any way modify the conclusion in *Parker* and its progeny that, where instead *sovereign regulatory conduct by public officials* is at issue, the Sherman Act simply does not

apply. *Id.* at 103-04 (citing *Parker*, 317 U.S. at 351). In short, *Midcal* does not exclude "self-interested" officers from *Parker's* protection of state sovereignty.

2. *Parker's* factual context. A super-majority of the state commission's public officials were also private producers of agricultural commodities. Pet. Br. 21-22. They were thus hardly "disinterested" when approving marketing programs that were proposed by producers of agricultural commodities to increase prices. *Id.* 39-40.

The FTC responds (Br. 42) that *Parker* did not expressly address the commission's composition. But the opinion did cite the statutory section mandating that composition. Pet. Br. 21-22. Moreover, the FTC's suggestion that the *Parker* Court sloppily overlooked the commission's composition is especially unlikely given that the Court exclusively relied on the commission when holding that the marketing program there was "state action" rather than the "individual ... action" of "producers." 317 U.S. at 352. Thus, the better understanding of *Parker's* lack of reference to the commission's composition is that this factual issue was (and is) legally irrelevant under the decision's federalism-based rationale.

The FTC also asserts (Br. 43) that "only a minority" of the commission "would [have] be[en] financially interested" in the "particular" marketing program for raisins, given that the statute provided that "no two of [the producer-members] shall be appointed as representing the same commodity." But the FTC ignores the structural self-interest to back-scratch: each producer-member had a financial interest to approve the marketing programs for the commodities of his fellow producer-members in order

to encourage them to do likewise for his own commodity. More fundamentally, it is implausible that this landmark decision, with its broadly stated legal rationale, rested on a narrow, unstated, and questionable factual premise—*i.e.*, that the raisin program did not sufficiently implicate the financial interests of the producer-members of other represented agricultural commodities that were potentially "substitute" goods or otherwise economically intertwined. *See* Antitrust Scholars *Amicus* Br. 13-14 & n.9 (listing the other products: grapes, prunes and apricots, peaches, citrus fruit, and vegetables). In sum, the FTC's "disinterested official" argument cannot be reconciled with *Parker*.

3. *Omni's* legal reasoning. *Omni* rejected the proposition that "government *regulatory* action may be deemed private ... when it is taken pursuant to a conspiracy with private parties": principles of federalism preclude either (a) questioning whether conspiratorial state regulatory action is "not in the public interest," or (b) invalidating such action based on "principles of good government," which are "unrelated" to the Sherman Act's purposes. 499 U.S. at 374-79; *see also* Pet. Br. 30-31. Importantly, *Omni* did not include any qualification that the "government regulator[s]" in a "conspiracy" to benefit "private parties" cannot have *financial self-interests*. Such a condition would have contradicted *Omni's* federalism-based rationale. Pet. Br. 39-40, 45-47.

Yet again, the FTC's short discussion of *Omni* (Br. 44-46) never tries to reconcile the FTC's "disinterested official" argument with *Omni's* core precept that public regulatory action may not be treated as private action simply because the public

officials involved also have private interests at stake. Rather, the FTC principally suggests (*see id.* 44-45) that *Omni* was limited to the question whether public officials in a conspiracy "forfeit[ ] otherwise-available state-action protection," which the FTC proclaims is an "entirely different" question from whether public officials in a conspiracy must be actively supervised to "invoke the state-action doctrine in the first instance." But this doctrinal hair-splitting is untenable.

Omni's federalism-based rationale for why a private "conspiracy" by public officials does not justify creating an "exception" to immunity equally controls why such a conspiracy does not justify requiring active supervision as a predicate to immunity. Regardless of doctrinal labels, it is substantively improper to question whether public officials' potential conflicts of interest caused them to take state regulatory action that was "not in the public interest"; and it is also substantively improper to invalidate state regulatory action solely because public officials' potential conflicts of interest may violate "principles of good government," which are "unrelated" to the purposes of federal antitrust law. *Omni*, 499 U.S. at 374-79; *see also* Pet. Br. 39-40, 45-47. In short, *Omni's* substantive conclusions equally foreclose imposing the active-supervision standard on regulatory action taken by public officials who may be conspiring to further their private "self-interests."

4. *Omni's* factual context. The conspiracy alleged was a *quid pro quo* bribery "agreement," with public officials receiving campaign contributions "in return for" restraining competition against a private

business. Pet. Br. 54. Those officials were thus the antithesis of "disinterested." *Id.* 45-46.

The FTC responds (Br. 44-45) that *Omni* immunized bribery only because it deemed a "subjective" inquiry into officials' motives to be "impractical," whereas the FTC here supposedly advances an "objective" approach to identify "a *structural* risk of self-interested behavior." But *Omni* does not permit this proposed distinction. While *Omni* criticized "a subjective test" as "arguably even worse," 499 U.S. at 377, it also condemned any other test of whether "the public interest" is being subordinated to a private conspiracy, because it "reject[ed] ... *any interpretation* of the Sherman Act that would allow plaintiffs to look behind the actions of state sovereigns to base their claims on 'perceived conspiracies to restrain trade,'" *id.* at 377, 379 (emphasis added). The proposed distinction also is itself "impractical," because allegations about "subjective" motives can always be reframed to allege "objective" "structural risks." Indeed, the *Omni* plaintiffs themselves could have asserted an objective, structural risk of self-interested behavior where public officials take anticompetitive regulatory actions that favor private parties who make large campaign contributions. *See id.* at 367-68.

The FTC also contends (Br. 45-46) that, whereas *Omni* deemed bribery of public officials by market participants to be a form of "corruption" that is "unrelated" to the purposes of federal antitrust law, those purposes are supposedly implicated by the potential for private gain by public officials who are themselves also market participants. But the whole point of *Omni's* bribery holding is that federal

antitrust law is *indifferent* to the "ethics" of whether public officials are financially disinterested when they displace competition, 499 U.S. at 378-79, as long as they do so "in their governmental capacities as sovereign regulators," *id.* at 374.

Finally, as *amici* supporting the FTC, Professor Elhauge and other academics err when positing that being bribed by market participants is a type of financial interest somehow distinguishable from being a market participant oneself. *See* Antitrust Scholars *Amicus* Br. 16-17. Drawing such illusory distinctions, much like distinguishing among the financial interests of the agricultural producers in *Parker*, would turn the "disinterested official" inquiry into a quasi-empirical, quasi-legal approach, which would be unpredictable for the States, unworkable for the courts, and burdensome for all. Indeed, *amici* later contradict themselves when they argue that non-market-participants who are elected to public office by market participants must be treated as private actors just because they "surely know[ ] which side [their] bread is buttered on and will act to advance th[ose] interests." *See id.* 29. That, of course, was equally true for *Omni's* bribed officials and *Parker's* producer-members.

In sum, as other scholars have recognized (Pet. Br. 54-55), *Omni* forecloses the "disinterested official" argument, because a public official's financial self-interest from bribe-taking is "unrelated" to the Sherman Act's purposes, and because distinguishing bribery from other types of allegedly relevant financial self-interests is so "impractical" as to drain the word "disinterested" of all meaning. *See* 499 U.S. at 377-79.

B. The FTC's Position Misunderstands *Hallie* And The Active-Supervision Standard

Beyond conflicting with *Parker* and *Omni*, the FTC's "disinterested official" argument is flawed on its own terms. Neither of the FTC's two related rationales is consistent with the active-supervision standard's limited role in our federalist system, and each one is grounded in a mistaken reading of *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985).

1. The FTC's primary rationale (*see* Br. 24-25, 29-30) is that, because enforcing even a clearly articulated anticompetitive state policy may "require[ ] significant interstitial choices," there supposedly is too much "risk" that public officials who are also market participants will exercise such gap-filling authority "to further their own private interests" rather than the State's public interests. But this rationale is fundamentally flawed.

a. This Court has explained that a State's legislature need not "describe ... in detail" the implementation of a clearly articulated policy to displace competition because doing so would make "it difficult to implement [the policy] through regulatory agencies ... th[at] are able to deal with problems unforeseeable to, or outside the competence of, the legislature." *S. Motor Carriers Rate Conf., Inc. v. United States*, 471 U.S. 48, 64-65 (1985). Moreover, contrary to the FTC's argument, this Court has held that how a State's public officials exercise their delegated discretion to regulate anticompetitively is not a legitimate concern of federal antitrust law.

First, insofar as public officials' private interests might lead them to exceed their state-law authority, *Omni* held that redressing "substantive[ ] or ...

procedural[ ] defect[s]" is not "a federal antitrust job," but rather the role of "state administrative review." 499 U.S. at 371-72.

Second, insofar as public officials' private interests might influence their permissible state-law choices, *Omni* held that federal antitrust law does not "set[ ] up a code of ethics." *Id.* at 378-79. A public official's self-interest bears "no necessary relationship to whether [his] governmental action is in the public interest." *Id.* at 378. Indeed, "the 'public' interest" that motivated the Legislature to authorize the anticompetitive regulatory regime may *itself* have been an unvarnished desire to benefit "the 'private' interest" of market participants. *Id.* at 377.

Finally, *Parker* held that federal antitrust law does not interfere with "a state's control over its officers and agents." 317 U.S. at 351. And it would "undermin[e] the very interests of federalism [that *Parker*] is designed to protect" if immunity turned on a State's sovereign decisions about whether and how to bear the risk that its officials may have conflicts of interest that could influence their regulatory actions. *See Omni*, 499 U.S. at 372; *see also* Pet. Br. 48-49.

b. The FTC's contrary argument rests on a misinterpretation of certain language from *Hallie* concerning the active-supervision standard. Specifically, *Hallie* noted (and later cases repeated) that, whereas "a private party" must be actively supervised since "there is a real danger that he is acting to further his own interests[ ] rather than the governmental interests of the State," "a municipality" need not be actively supervised since "there is little or no danger that it is involved in a *private* [anticompetitive] arrangement." 471 U.S. at

47; *accord Patrick v. Burget*, 486 U.S. 94, 100-01 (1988); *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 633-34 (1992). The FTC construes (Br. 33-34) *Hallie's* "danger" language to create a "link between the active-supervision requirement and the risk of self-interested behavior in the implementation of state policy." But that construction of *Hallie* is unsound.

Rather than focusing on whether the state-authorized actor at issue poses too great a risk of *flouting* state policy, *Hallie's* "danger" language is focused on whether the "state policy" *itself* poses too great a risk of "circumventing the Sherman Act's proscriptions 'by casting ... a gauzy cloak of state involvement over what is essentially a private [anti-competitive] arrangement.'" *See* 471 U.S. at 46-47 (quoting *Midcal*, 445 U.S. at 106). Namely, where the State clearly authorizes a *private actor* to engage in anticompetitive *business* activity, there is a "real danger" that the State seeks only "to further his [private] interests, rather than [any] governmental interests" other than the illegitimate desire to "give immunity to those who violate the Sherman Act by authorizing them to violate it." *See id.* at 47; *Parker*, 317 U.S. at 351. Active supervision of clearly-authorized private business activity is therefore necessary for "the State effectively [to] ma[ke] th[e] conduct its own." *See Patrick*, 486 U.S. at 105-06. Conversely, where the State clearly authorizes a *public entity* to engage in anticompetitive *regulatory* activity, "there is little or no danger" that the entity is a sham created to immunize "a *private* [anti-competitive] arrangement." *See Hallie*, 471 U.S. at 47. Active supervision of any clearly-authorized public regulatory activity is thus unnecessary because there is no realistic doubt that "the anti-

competitive scheme is the State's own." *See Ticor*, 504 U.S. at 635.

To be sure, *Hallie's* "danger" language is susceptible to misinterpretation, especially if read in isolation. *See FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1011 (2013) (in *dicta*, describing *Hallie* as focusing on an actor's "incentive[s]"). But the "risk of self-interest" interpretation of *Hallie* is untenable when considered in light of this Court's entire state-action antitrust jurisprudence. The FTC's position openly requires reading *Midcal* to have "refined" *Parker* by imposing an active-supervision standard for all actors, and reading *Hallie* then to have "modified" *Midcal* based on an intuitive judgment about the relative incentives of public officials. FTC Br. 2-4. Furthermore, the FTC's position ultimately requires ignoring the unambiguous holdings in *Parker* and *Omni* that federalism forecloses construing the Sherman Act to restrain how a State's public officials exercise their discretion when (disinterested or not) they enforce a clearly articulated sovereign policy to displace competition. By contrast, the Board's interpretation of *Hallie* is consistent with the results, and faithful to the reasoning, of all this Court's precedents.

2. The FTC's secondary rationale (*see* Br. 29-31, 35-38) is that a public regulatory agency run by officials who are also market participants is supposedly most "closely analogous" to a "private trade association" whose conduct is sanctioned by the State, and therefore the former should be actively supervised just as the latter must be. But the two entities are treated differently because they are fundamentally different.

a. The two entities differ in kind from the perspective of federalism. A private trade association engages in "business" that is subject to the Sherman Act, and the State cannot "give immunity to [it]" merely "by authorizing [it] to violate [the Act]." *See Parker*, 317 U.S. at 351. By contrast, part-time officials of a public regulatory agency who are also market participants are still the State's "officers," whom the Sherman Act does not "restrain ... from activities directed" by clearly articulated sovereign policy. *See id.* at 350-51.

The two entities also differ in kind even from the perspective of "self-interest." A private trade association "may be presumed to be acting primarily on ... its own behalf." *See Hallie*, 471 U.S. at 45. And that remains true where the State clearly authorizes it to act anticompetitively, because it is still conducting private business activity. *See Ticor*, 504 U.S. at 628; *Midcal*, 445 U.S. at 105-06. By contrast, a public agency's part-time officials who are also market participants "may [be] presume[d]"—like all other public officials—to "act[ ] in the public interest" when conducting regulatory activity. *See Hallie*, 471 U.S. at 45; *see also Filarsky v. Delia*, 132 S. Ct. 1657, 1667 (2012) ("[I]individuals working [part-time] for the government in pursuit of government objectives are 'principally concerned with enhancing the public good.'").

Notwithstanding such officials' personal interests, they too have sworn an oath to faithfully enforce the law, *e.g.*, *Parker*, 317 U.S. at 346; N.C. Gen. Stat. § 11-7, and are "assumed to be men of conscience and intellectual discipline," *Withrow v. Larkin*, 421 U.S. 35, 55 (1975), whose motives are

not to be questioned under federal antitrust law, *Omni*, 499 U.S. at 378-79. Furthermore, their *bona fide* regulatory conduct "is invariably more likely to be exposed to public scrutiny" than is private business conduct, given judicial review of administrative action, legislative and executive oversight, and ethics and disclosure rules. *See Hallie*, 471 U.S. at 45 n.9; *Omni*, 499 U.S. at 371-72, 378-79; Pet. Br. 6-7.[1]

In nevertheless accusing market-participant officials of prioritizing their private interests over state regulatory policy, the FTC invokes an unduly narrow conception of the legitimate public interests that state regulatory policy may pursue. The FTC suggests (*see* Br. 31-32) that market-participant officials are obviously subordinating the public interest if their enforcement of a clearly articulated state policy to displace competition is intended to protect the profits of regulated businesses rather than the welfare of consumers. But such profit-protecting regulation "is not universally considered contrary to the public good," *Omni*, 499 U.S. at 377, and States (as well as Congress) often adopt such regulatory policies, *see, e.g.*, *Parker*, 317 U.S. at 346 ("maintain[ing] prices" of agricultural commodities); *Hoover v. Ronwin*, 466 U.S. 558, 574 (1984) ("devis[ing] a grading formula ... to limit the number

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[1] In the FTC's unrealistic hypothetical (Br. 37) where a State labels private entities as "state agencies" without also substantively requiring them to enforce a regulatory standard and to follow the traditional duties of public officials, this Court could disregard the state-law nomenclature as an *objectively baseless sham* that seeks to immunize rather than regulate private business conduct. *Cf. Omni*, 499 U.S. at 379-80 (similar "sham" exception for *Noerr-Pennington* immunity).

of lawyers"). Indeed, the FTC's own *amici* observe that a state agency's structure at most "exacerbates" the "rent seeking" dynamic that affects *all* governmental entities, including legislatures. *See* Public Choice Scholars *Amicus* Br. 11-12; *see also id.* 12-15, 18-20; Pet. Br. 47.

In sum, public agencies run by market-participant officials are not more "analogous" to state-sanctioned private trade associations than to public agencies run by "disinterested officials." *All* public officials are fundamentally different from private actors, and thus they are treated distinctly.

b. The FTC's refusal to accept that critical distinction likewise explains its erroneous reliance (*see* Br. 4, 18-19, 37-38) on a sentence in *Hallie* reaffirming that "active state supervision must be shown" "[w]here state or municipal regulation by a private party is involved." 471 U.S. at 46 n.10. *Hallie* was referencing cases like *Southern Motor Carriers*, where market participants act *in their capacities as private businesses* and yet their actions are given *regulatory effect* by the State. *See id.* (citing 471 U.S. at 62). *Hallie* was not referencing cases like this one (and *Parker*), where instead market participants act *in their capacities as public regulatory officials* of the State. Indeed, the prior sentence in *Hallie* provided that active supervision "likely ... [would] not be required" where "the actor is a state agency." *Id.*

Justice Powell, who authored the *Hallie* opinion, recognized the inherent difference between a private actor and a public official who is also a market participant. He (along with three other Justices who joined *Hallie*) had previously joined the plurality

opinion in *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978), which found it "obvious" that a "State Bar's official actions" "cannot [be] transmute[d] ... into those of a private organization" just because they "benefited [the Bar's] member-lawyers." *Id.* at 411 n.41.

In sum, the FTC draws a false dichotomy (Br. 27) between "interested private parties acting alone" and "disinterested public officials." There also exist public officials with private interests, and their "governmental *regulatory* action may [not] be deemed private" even if it reflects a "conspiracy" to benefit their own interests. *Omni*, 499 U.S. at 375.

C. The FTC's Position Is Not Supported By Any Of This Court's Other Decisions

Beyond misunderstanding *Hallie*, the FTC and its *amici* erroneously contend that their "disinterested official" argument finds support in a few other precedents.

1. The FTC emphasizes (Br. 39-40) the statement in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), that "[t]he fact that the State Bar is a state agency for some limited purposes does not ... allow[ ] it to foster anticompetitive practices for the benefit of its members." *Id.* at 791. But the opinion nowhere says that the State Bar was acting as a "private party" for the "purpose" at issue. Rather, *Goldfarb* said that the Bar was not "acting as sovereign," "because it [could not] fairly be said that ... [the] Supreme Court Rules required [the Bar's] anticompetitive activities," *id.* at 790; the Bar instead "ha[d] voluntarily joined in what [was] essentially a private anticompetitive activity" by issuing ethical opinions that coerced compliance with

a private bar association's minimum-fee schedules, *id.* at 791-92. That analysis is a pre-*Midcal* no-clear-articulation holding, as this Court has repeatedly recognized. Pet. Br. 50.

The FTC responds (Br. 40) that "lack of clear articulation was [not] the *sole* basis" in *Goldfarb*, which purportedly withheld immunity "for a number of reasons," including "the lack of adequate supervision." In actuality, though, *Goldfarb* said that it "need not inquire further" than "[t]he threshold inquiry" whether a "sovereign" anti-competitive policy existed. *See* 421 U.S. at 790. While *Goldfarb* did reference the lack of active supervision by the Virginia Supreme Court, *id.* at 791, that reference was "relevant to the inquiry" (*Hoover*, 466 U.S. at 569) only insofar as *ex post* supervision by the sovereign might have been *sufficient* to warrant immunity, *see id.* at 572-73, even though it would not have been *necessary* if *ex ante* sovereign articulation had been present.

The FTC also observes (Br. 40) that *Hallie* described *Goldfarb* (and another earlier decision) as cases that "concerned private parties." But that comment in *Hallie* appears to have been referencing a sentence in *Goldfarb* focused on the *private bar association*. Namely, *Goldfarb* suggested that the conduct of "the County Bar" "must be compelled" by the sovereign, *see* 421 U.S. at 791, and *Hallie* distinguished that suggestion when holding that public officials' conduct need not be "compelled," *see* 471 U.S. at 45. *Hallie* did not characterize *the State Bar* in *Goldfarb* as a "private party"; indeed, Justice Powell and three other Justices in *Hallie* had *refuted* that characterization in *Lafayette*, *supra* at 15-16.

2. The FTC likewise errs (Br. 40-41) in invoking *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). *Bates* granted immunity to the State Bar because "the challenged restraint [was] the affirmative command of the Arizona Supreme Court" through its disciplinary rules, which "reflect[ed] a clear articulation of the State's policy." *Id.* at 359-60, 362.

While *Bates* noted that, "[m]oreover," the Bar's enforcement of the rules was actively supervised by the Supreme Court, that observation *bolstering* the Bar's immunity does not suggest that active supervision was *necessary*. *Id.* at 362. Nor did *Bates* describe the State Bar as a "private party." As for the FTC's observation (Br. 41) that *Patrick* included *Bates* in a sentence that referenced "prior cases concerning state supervision over private parties," the focus of that sentence was on the types of entities *performing* the supervision, not on the types of entities being supervised. *See* 486 U.S. at 103-04.

3. Finally, Professor Elhauge and his fellow academics accuse the Board of "ignor[ing]" *Continental Ore Co. v. Union Carbide*, 370 U.S. 690 (1962), and *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988). Antitrust Scholars *Amicus* Br. 6-8. But those cases are indisputably inapposite.

Continental Ore expressly *declined* to consider the *Parker* immunity "question of the liability of the Canadian Government's agent"; instead, it held only that private corporations could be found "liable for actions which they themselves jointly took," as they were "not insulated by the fact that their conspiracy involved some acts by the agent." 370 U.S. at 706. Even further afield, *Allied Tube* held that *Noerr-*

Pennington immunity was unavailable to a private company that influenced the "standard-setting process of a private association" that had been conferred "no official authority ... by any government." 486 U.S. at 495, 501. These points likely explain why the FTC also "ignored" these cases, as did Elhauge's *co-counsel* in their law-review article's discussion of precedent, *see* Pet. Br. 58.

II. REQUIRING STATE OFFICIALS TO BE "DISINTERESTED" WOULD HARM STATE REGULATORY REGIMES

Beyond failing to reconcile the "disinterested official" argument with this Court's precedents, the FTC fails to reconcile its argument with established federalism principles or settled state practice.

A. The FTC's Position Would Seriously Undermine Federalism

The FTC claims (Br. 46) that its position "furthers the principles of federalism underlying the state-action doctrine." The State *amici* resoundingly reject that claim: 23 States and the national associations of governors and state legislatures support the Board, WV *Amicus* Br.; NGA *Amicus* Br., while *no* state entity supports the FTC (unlike in *Phoebe Putney* and *Ticor*). This is because the FTC's position is a grave affront to state sovereign dignity.

1. The FTC argues (Br. 46-47) that the general "presumption that Congress does not intend to intrude on the State's prerogatives" is inapplicable, because that presumption applies only to "claims that federal statutes *prohibited* States from taking particular actions related to their own governmental structures." But the FTC's "claim" here is *precisely* that the Sherman Act prohibits States from using

public officials who are also market participants to enforce anticompetitive state policies without active supervision by other state officials. Nor does the Sherman Act provide the clear statement needed (Pet. Br. 19, 33-34) to overcome the presumption that Congress leaves such sovereign structuring decisions to the States. *Parker*, 317 U.S. at 350-51.

Compounding its error, the FTC contends (Br. 47) that "the presumption runs in the opposite direction," because this Court has observed that "state-action immunity is disfavored, much as are repeals by implication." *Phoebe Putney*, 133 S. Ct. at 1010 (quoting *Ticor*, 504 U.S. at 636). But that observation was made in entirely different contexts. *Ticor* involved private businesses, 504 U.S. at 628, and *Phoebe Putney* involved a local government acting without clear anticompetitive authorization from the State, 133 S. Ct. at 1007. In those contexts, granting state-action immunity would have functioned as a "repeal by implication" because the Sherman Act's broad text presumptively applies to *non-sovereign* actors, including both private "individuals and corporations" and public officials who are not performing "activities directed by [the] legislature." *Parker*, 317 U.S. at 350-51. By contrast, where, as here, a State's "officers" are performing "activities directed by its legislature," the Sherman Act's broad text was never intended to apply in the first place, because "the states are sovereign." *Id.*; *accord Omni*, 499 U.S. at 374.

2. The FTC further observes (Br. 48) that its position "leave[s] States free to choose among a variety of regulatory structures." But, absent a clear statement, federal statutes should not be construed

to constrain a State's right to choose the *particular* regulatory structure that will "define[ ]" it "as a sovereign," even if various structures remain available. *See, e.g.*, *Gregory v. Ashcroft*, 501 U.S. 452, 460-61, 467 (1991).

Moreover, as 23 States emphasize, the FTC's position deprives them of the "ability to use a method of governance that they have found desirable and beneficial," and forces them to choose among alternatives that they believe will have "significant negative consequences." WV *Amicus* Br. 3-4, 7; *see also id.* 8-17; Pet. Br. 34-36. Even worse, the FTC imposes these sovereign injuries for the insulting reason that it does not trust State officials to honor their oaths and does not favor the States' methods for addressing any conflicts of interest. NGA *Amicus* Br. 14-18; Pet. Br. 48-49.

3. The FTC also objects (Br. 49) that "no official of North Carolina can be held politically accountable" for the Board's conduct here because the Board's dentist-members are elected by other dentists. This objection is triply flawed.

First, the FTC's "disinterested official" argument applies to *all* agencies run by market-participant officials, and "the vast majority" of those officials are "appointed by the Governor or another disinterested state official." *Id.* 35.

Second, even for agencies structured like the Board, the FTC ignores the public's ability to hold legislative and executive officials accountable for insufficient oversight. Pet. Br. 6-7.

Third, and most fundamentally, *Parker* immunity is not conditioned on whether the relevant actor is politically accountable. *See, e.g.*, *Hoover*, 466

U.S. at 568 (state supreme court justices are "ipso facto" immune). Contrary to the FTC's suggestion, *Ticor* was not concerned about guaranteeing that the anticompetitive actor can be held "politically accountable" by the voting public, but rather about merely *clarifying* which actor properly bears "political responsibility" for anticompetitive conduct. 504 U.S. at 636. In *Ticor*, "responsibility" was "obscure[d]" because consumers would not know whether to blame high insurance rates on private companies or state agencies. *See id.* at 629, 636. By contrast, "responsibility" is clearly "assign[ed]" (*id.* at 636) where, as here, a state agency openly takes regulatory action—whether or not its officials are also market participants elected by other market participants. Indeed, the Board's "orders appeared on official letterhead." FTC Br. 9; J.A. 10.

4. The FTC finally emphasizes (Br. 49-51) that the Board's "claim of an intrusion on state prerogatives rings particularly hollow" because the Board's "cease-and-desist orders ... exceeded its state-law authority." But the FTC's "disinterested official" argument applies whether or not state law authorized those orders. More importantly, policing the Board's state-law compliance is not a "federal antitrust job," but rather the role of "state administrative review," *Omni*, 499 U.S. at 372, which was available here through judicial and political avenues, Pet. Br. 6-7. By raising such state-law issues, the FTC flouts *Omni* and "undermin[es] the very interests of federalism [that *Parker*] is designed to protect." 499 U.S. at 372.

B. The FTC's Position Would Massively Disrupt The Status Quo

The FTC claims (Br. 52) that its position "will not unduly disrupt state regulation." But the FTC inaccurately describes the status quo.

1. The FTC contends (*id.* 52-53) that there is no widespread "consensus" in the courts of appeals that the active-supervision standard is inapplicable to agencies run by market-participant officials. But that contention—in addition to ignoring the States' reasonable reliance directly on *Parker*, *Hallie*, and *Omni*—fails to refute the critical fact that "no court in the 70 years since *Parker* has ever held otherwise ..., even though there are countless [such] state agencies." Pet. Br. 13, 58.

To be sure, the FTC argues (Br. 53) that a few circuit court decisions "strongly indicat[ed]" that active supervision of such agencies was required. But the FTC's own academic *amici* previously acknowledged that those cases were weak "dicta" at best. Pet. Br. 4; *see also* Cert. Pet. 17-18. Indeed, they admitted that the FTC's position "would upset the balance between state and federal power struck in *Parker* and its progeny." Pet. Br. 58.

2. The FTC further asserts (Br. 53-55) that it is not "typical" for state agencies with market-participant officials to be "unsupervised." But the FTC shows only that *some* acts of *some* state dental boards are supervised to *some* extent.

That meager showing hardly refutes the concerns of the Board's *amici* that *many* state agencies with market-participant officials perform *many* acts that are not necessarily *actively* supervised, and that many of those acts *should not*

be actively supervised by non-market participants. NGA *Amicus* Br. 12-14, 29-30; WV *Amicus* Br. 13-17. Indeed, the FTC's own *amici* previously admitted that the FTC's position would "alter the equilibrium of a complex system of regulation" by "put[ting] thousands of boards under the Sherman Act's microscope." Pet. Br. 58.

3. The FTC finally suggests (Br. 55-56) that this Court in *Patrick* "rejected ... arguments" "similar" to the representation by the Board's *amici* that professionals will be deterred from serving on state regulatory boards if active supervision is required, ADA *Amicus* Br. 5, 23-25; WV *Amicus* Br. 11. But *Patrick* rejected only the argument that private doctors would be chilled from participating in a hospital's "*private* peer-review decisions." 486 U.S. at 102, 105 (emphasis added). That objection was wholly dissimilar from the accepted concern that antitrust liability should not "deter 'able citizens' from performing ... essential public service" on state regulatory bodies. *Hoover*, 466 U.S. at 580 n.34; *see also Filarsky*, 132 S. Ct. at 1665-66 ("[T]he most talented candidates will decline public engagements if they do not receive the same immunity enjoyed by their public employee counterparts."). The FTC again misses the fundamental distinction between private business conduct and public regulatory conduct.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 13-534

In The Supreme Court of the United States

NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR THE AMERICAN ANTITRUST INSTITUTE AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE

The American Antitrust Institute (AAI) is an independent and nonprofit education, research, and advocacy organization devoted to advancing the role of competition in the economy, protecting consumers, and sustaining the vitality of the antitrust laws. The AAI is managed by its Board of Directors, with the guidance of an Advisory Board that consists of over 130 prominent antitrust lawyers, law professors, economists, and business leaders. *See* http://www.antitrustinstitute.org.[1] The AAI submits this brief in support of affirming the decision of the Fourth Circuit and Federal Trade Commission (FTC) because petitioner's expansive interpretation of the state-action defense, if adopted, would encourage the misuse of financially interested state licensing boards to exclude competitors without any assurance that it was the State's policy to do so, in conflict with both federalism concerns and our fundamental

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[1] The written consents of all parties to the filing of this brief have been lodged with the Clerk. No counsel for a party has authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than amicus curiae has made a monetary contribution to its preparation or submission. The AAI's Board of Directors alone has approved of this filing for the AAI. Individual views of board members or members of the Advisory Board may differ from the AAI's positions. The Advisory Board includes John Kwoka, who served as an expert witness for the FTC in this matter. Professor Kwoka took no part in the preparation of this brief.

national policy in favor of free and open competitive markets.

INTRODUCTION

Antitrust law has long been concerned about the risk of members of professional and other occupational licensing boards using governmental power to restrict competition for the protection of private profit rather than the public interest. *See Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791 (1975) ("The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members." (citing *Gibson v. Berryhill*, 411 U.S. 564, 578-79 (1973)); *Hoover v. Ronwin*, 466 U.S. 558, 583-84 (1984) (Stevens, J., dissenting) ("For centuries the common law of restraint of trade has been concerned with restrictions on entry into particular professions and occupations. [P]rivate parties have used licensing to advance their own interests in restraining competition at the expense of the public interest."); *cf. Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 501 (1988) (efforts to influence standard-setting association that set electrical code for many state and local governments not immune under the *Noerr-Pennington* doctrine when "the decisionmaking body of the Association is composed, at least in part, of persons with economic incentives to restrain trade").

The concern about financially self-interested parties making regulatory policy is not unique to antitrust, as *Goldfarb*'s citation to *Gibson v. Berryhill* attests. *See Gibson*, 411 U.S. at 578-79 (holding that it would be violation of Due Process for the Alabama Board of Optometry, which was composed solely of optometrists in private practice, to adjudicate action that would have excluded salaried optometrists); *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936) ("This is a legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business."). Indeed, the concern is the same as that reflected in "the maxim that '[n]o man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.'" *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) (quoting The Federalist No. 10, at 59 (James Madison) (J. Cooke ed., 1961)) (brackets in original). As Professor Jaffe aptly noted long ago, "The learned professions might be trusted in the majority of cases to regulate practice on principles of expertness, though here judgment will be subtly corroded by prejudice of various sorts aroused into action by the will to monopolize." Louis L. Jaffe, *Law Making by Private Groups*, 51 Harv. L. Rev. 201, 249 (1937).

Delegating unsupervised regulatory power to market participants who are elected by their peers

multiplies the risks of self-interested behavior. Treating such representatives as anything but "private" for purposes of the state-action exemption offends basic principles of democratic government and accountability as well as basic economic assumptions about rational behavior. But regardless of how licensing boards are selected, the FTC's conclusion that boards dominated by market participants must satisfy the active-supervision requirement to be exempt from the antitrust laws is fully in accord with this Court's state-action precedents, good public policy, and the weight of academic scholarship across the ideological spectrum.[2] This brief does not repeat the arguments made by the FTC and the academic amici, but rather responds to two of the themes raised by petitioner (the Board) and its amici, namely that the holding of the FTC and the Fourth Circuit "grossly

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[2] Petitioner's claim that the position of the FTC "lack[s] widespread approval among scholars" (Pet'r Br. 53) is belied by the Brief of Antitrust Scholars As Amicus Curiae in Support of Respondent, which expresses support by an unusually large and ideologically diverse group of leading antitrust scholars. In addition to the canonical authorities cited in that brief, see Phillip Areeda & Donald F. Turner, 1 *Antitrust Law* ¶ 213b, at 74-75 (1978). *See also* Antitrust Modernization Commission, *Report and Recommendations* 373-74 (2007) ("AMC Report") (supporting Areeda & Hovenkamp approach); Comments of ABA Section of Antitrust Law on FTC Report re State Action Doctrine 15 (May 2005) (suggesting that active supervision be required when "a majority of the decision-making entities with the hybrid entity are private market participants"), http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/at_comments_ftc_doctrine05.authcheckdam.pdf.

disrespects" basic principles of federalism and will cause "significant disruption" of state occupational regulatory practices. Pet'r Br. 17, 36.

SUMMARY OF ARGUMENT

1. Applying federal antitrust laws to unsupervised financially self-interested state boards supports, rather than undermines, federalism because it "ensure[s] that particular anticompetitive conduct has been approved by the State." *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 637 (1992). Like purely private parties, state boards dominated by market participants have an incentive to implement state policy in ways that advance their own interests, rather than the State's. Petitioner's argument that the active-supervision requirement is not designed to address the "agency problem," i.e., that self-interested boards will deviate from state policy, is inconsistent with this Court's explicit reasoning in *Town of Hallie*, *Patrick*, and *Ticor* and the "evidentiary function" petitioner concedes the requirement serves. In this case, North Carolina intended to restrict competition in the dental services market, and so the FTC assumed the clear-articulation prong was satisfied. But North Carolina law was not clear that teeth whitening by bleaching constituted the practice of dentistry, and so the Board's exclusion of non-dentist teeth whiteners was an exercise of significant discretion that did not necessarily accord with state policy.

2. Petitioner's argument that potential "state administrative review" is sufficient to correct self-interested state boards that deviate from state policy misses the point that the anticompetitive conduct itself must be a deliberate product of state policy in order to warrant exemption. Moreover, "state administrative review" was plainly insufficient in this case because the Board inflicted market harm using ultra vires procedures that enabled it to evade judicial review. Likewise the argument that state ethics laws are sufficient to prevent market participants from acting on their financial interests to restrict competition is belied by the facts of this case. In any event, the arguments about the adequacy of potential state remedies are beside the point because petitioner's federalism argument is that the sovereign's choice to use market participants as regulators must be respected regardless of how (or if) the State chooses to supervise them.

3. In practice, "state administrative review" of financially self-interested boards may well constitute active state supervision, and so the hyperbolic arguments of petitioner and its amici that upholding the FTC here will require a radical restructuring of state regulatory regimes are simply false. Review by the courts of North Carolina *before* any exclusion occurs ordinarily would constitute active state supervision, provided that the reviewing court could disapprove those particular anticompetitive acts that fail to accord with state policy. Other common forms of review of self-interested boards may also be

sufficient. Moreover, the degree of supervision required will depend to some extent on the degree of independent discretion exercised by the board. Routine disciplinary proceedings generally do not implicate the competitive interests of state boards and thus are not likely to raise issues of antitrust immunity or liability.

4. Requiring independent supervision of financially self-interested boards as a condition for exemption reinforces North Carolina's constitutional ban against monopolies. The North Carolina Supreme Court has applied this ban to strike down laws reserving certain services to licensed professions or occupations when the laws are not sufficiently justified by public safety concerns, particularly when the exclusionary decisions are left to the professions or occupations themselves.

5. Finally, holding unsupervised market-participant boards potentially liable for violating the antitrust laws will not impair the public health or deter qualified professionals from serving on regulatory boards. Lack of state-action protection does not necessarily mean liability. Antitrust allows for reasonable professional self-regulation to protect against threats to public health and safety, which were absent here. Moreover, as long as decisions to exclude competition are adequately supervised in ways that States commonly do, the state-action exemption will attach. Finally, sovereign immunity may well bar damages claims against the Board;

States are free to provide for the defense of, and indemnify, board members for any liability in their official or individual capacities; and, as here, boards may obtain private liability insurance. The case law has long suggested that financially self-interested boards (which have always had to act under the risk of not satisfying the clear-articulation requirement) are subject to the active-supervision requirement, and there is no evidence that fear of antitrust liability has impacted States' recruitment of active practitioners to serve as board members.

ARGUMENT

I. APPLYING FEDERAL ANTITRUST LAWS TO UNSUPERVISED FINANCIALLY INTERESTED STATE BOARDS RESPECTS FEDERALISM

The Solicitor General points out that "[a]llowing a State to supplant federal law if, but only if, it satisfies specified conditions is not an affront to federalism; it is an example of federalism in action." Resp't Br. 47. In addition, applying the active-supervision requirement to financially self-interested state boards serves the interests of States because, as it does with purely private actors, the requirement ensures that the antitrust laws are not displaced when state regulatory policy is implemented in a way that restricts competition more than the State intends. As applied here, the active-supervision requirement is particularly consonant with state

sovereignty because the Board evaded state procedures that would have cabined its discretion to restrict competition. Moreover, the State itself, through its constitutional ban on monopolies, has evinced concern about allowing members of occupations and professions to use state power to exclude competition for their own benefit rather than to promote public health and welfare.

A. Active Supervision Complements Clear Articulation to Ensure that Restrictions on Competition Are Intended by the State

Simply stated, the logic of applying the active-supervision requirement to a state agency dominated by market participants is that merely satisfying the clear-articulation requirement may leave the agency with significant discretion in implementing a policy intended to displace competition, which market participants have an incentive to exercise in ways that benefit themselves rather than in furtherance of state policy.

This Court has emphasized "the close relation between *Midcal*'s two elements. Both are directed at ensuring that particular anticompetitive mechanisms operate because of a deliberate and intended state policy." *Ticor*, 504 U.S. at 636. Even as recently tightened by this Court in *Phoebe Putney*, the clear-articulation test does not "require state legislatures to explicitly authorize specific anticompetitive effects

before state-action immunity could apply." *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1012 (2013). Rather, a more general authorization to displace competition may sometimes be sufficient. *See, e.g., City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365 (1991) (statute delegating zoning authority to city satisfied clear-articulation requirement for purposes of billboard restriction); *see* Resp't Br. 25 (noting that implementation of clearly articulated policy may require "significant interstitial choices," including "*how* and *to what extent* the free market should be restrained"). Thus, the clear-articulation requirement "cannot alone ensure, as required by our precedents, that particular anticompetitive conduct has been approved by the State." *Ticor*, 505 U.S. at 637.

"[G]iven the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws," *Phoebe Putney*, 133 S. Ct. at 1010, both prongs ensure that there is a real conflict between state regulatory policies and the antitrust laws before immunity is granted. *See* Phillip E. Areeda & Herbert Hovenkamp, 1A *Antitrust Law* ¶ 221, at 55 (4th ed. 2013) ("[E]ven the strongest concern[ ] for federalism requires federal law to yield to state law only when the state has declared its contrary interest."); *Phoebe Putney*, 133 S. Ct. at 1013 (explaining that in *Town of Hallie*, "[w]ithout immunity, federal antitrust law could have undermined [the State's] arrangement and taken completely off

the table the policy option that the State clearly intended for cities to have").

With respect to private parties, the active-supervision requirement is necessary because "'where a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State.'" *Patrick v. Burget*, 486 U.S. 94, 100 (1988) (quoting *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 47 (1985)); *see also id.* at 101 ("[a]bsent supervision, there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests"). But active supervision ordinarily does not apply to municipalities and other sub-state entities "because they have less of an incentive to pursue their own self-interest under the guise of implementing state policies." *Phoebe Putney*, 133 S. Ct. at 1011; *see Town of Hallie*, 471 U.S. at 45 ("We may presume, absent a showing to the contrary, that the municipality acts in the public interest.").[3]

Petitioner responds that the "active-supervision standard is not designed to address an alleged

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[3] One of the distinguishing features of "municipal officers, unlike corporate heads, [is that they] are checked to some degree through the electoral process." *Town of Hallie*, 471 U.S. at 45 n.9. Where state boards are elected by the industry they regulate, the electoral process exacerbates, rather than checks, market participants' incentives to protect the industry's prerogatives.

'danger' of self-interested actors deviating from the State's interests." Pet'r Br. 44. Rather, according to petitioner, it is designed to protect against a state policy that "merely allow[s] private actors to violate federal law." *Id.*; *see also id.* at 51. The argument is unconvincing. To be sure, the active-supervision requirement *does* prevent States from exempting private actors from the federal antitrust laws by fiat, as the state-action defense is reserved for the displacement of competition by regulation. *Parker v. Brown*, 317 U.S. 341, 351 (1943) ("a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful"); Areeda & Hovenkamp, ¶ 226, at 179 ("*Parker* allows the states to substitute state regulatory programs for the market but not to authorize (or even compel) private parties to displace market competition with their own unsupervised preferences."). But petitioner cannot explain away this Court's reasoning in *Town of Hallie*, *Patrick*, and *Ticor* that the active-supervision prong *also* serves as a complement to the clear-articulation requirement in ensuring that a State intends to restrict competition in the particular manner at issue.[4] Indeed, petitioner's

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[4] Petitioner argues that the "risk of self-interest" rationale is irreconcilable with *Omni*'s rejection of a conspiracy exception even if state officials are bribed. Pet'r Br. 45-46. The FTC and amici antitrust scholars refute this point, noting among other things that treating regulators as private when they make their living in the industry they regulate requires no probing of

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acknowledgment (Pet'r Br. 26-27) that the active-supervision requirement "serves essentially an evidentiary function: it is one way of ensuring that the actor is engaging in the challenged conduct pursuant to state policy," *Town of Hallie*, 471 U.S. at 46, refutes its own argument that the active-supervision requirement plays a wholly "distinct role" in the analysis.[5] Pet'r Br. 42, 44.

Petitioner also argues, "where [the clear articulation] standard is satisfied, the public interests of the State and any private interests of its market-participant officials are *both anticompetitive and presumptively aligned*." *Id.* at 42. Thus, according to petitioner, "North Carolina and the Board's practicing dentists share the same interest in ensuring that 'only qualified persons be permitted to practice

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officials' subjective motives or other impracticalities that concerned the Court in *Omni*. Moreover, the proposed conspiracy exception would have applied to law making, even by state legislatures, and thus was inconsistent with the principle that the "antitrust laws regulate business, not politics." *Omni*, 499 U.S. at 378, 383. In contrast, the exercise of regulatory power by market participants is a traditional concern of antitrust, and one recognized by *Omni* itself in its acknowledgment of a possible market-participant exception to *Parker*. *See id.* at 374-75, 379.

[5] *Town of Hallie* likened the evidentiary function of the active-supervision requirement to that of state compulsion. 471 U.S. at 46. Rejecting the argument that clear articulation required a showing that the State compelled the City to act, this Court said, "[a]lthough compulsion affirmatively expressed may be the best evidence of state policy, it is by no means a prerequisite to a finding that a municipality acted pursuant to clearly articulated state policy." *Id.* at 45-46.

dentistry.'" *Id.* at 43 (quoting N.C. Gen. Stat. § 90-22(a)). However, North Carolina and the Board's practicing dentists do not necessarily share the same interest in ensuring that only dentists engage in teeth whitening.

North Carolina clearly articulated an intention that competition be restricted in the dental services market, which arguably satisfies the clear-articulation test. But it is at least an open question whether North Carolina more particularly intended to bar teeth whitening by non-dentists. The Commission did not reach that question, but explained, "Absent some form of state supervision, we lack assurance that the Board's efforts to exclude non-dentists from providing teeth whitening services in North Carolina represent a sovereign policy choice to supplant competition rather than an effort to benefit the dental profession." Pet. App. 59a; *see also id.* at 123a ("North Carolina courts have never concluded that teeth whitening services provided by non-dentists are unlawful.").[6]

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[6] The Board has insisted that teeth whitening is unlawful unless performed by a dentist because the Dental Practice Act provides, "A person shall be deemed to be practicing dentistry" if he "[r]emoves stains, accretions or deposits from the human teeth." N.C. Gen. Stat. § 90-29(b)(2). However, expert testimony in the record suggested that, "in terms of both a scientific and historical context, the reference to 'removal of stain' as the practice of dentistry in the Dental Practice Act, enacted in the 1930s, most likely referred to physical removal of stains with a scaler or abrasive rather than clinical bleaching" which is at

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B. Potential State Remedies Provide No Basis for Immunity

Petitioner concedes "it is conceivable that officials who are also market participants could have incentives to *over-enforce* their States' anticompetitive policies," but contends that "the States are fully equipped to handle that concern themselves through, among other things, 'state administrative review.'" Pet'r Br. 43; *id.* at 44 ("[A]ny concern about the specific manner in which the Board enforced the statutory ban on the unlicensed practice of dentistry can be raised before North Carolina's courts or with the State's political branches that perform oversight of the Board."). There are two problems with this "adequate state remedies" argument. First, as this Court recognized in *Ticor*, "the purpose of the active supervision inquiry is not to determine whether the State has met some normative standard, such as efficiency, in its regulatory practices." 504 U.S. at 634. Just as

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issue here and "does not actually result in the removal of stains." Complaint Counsel's Post Trial Brief and [Proposed] Order at 6 (Apr. 25, 2011) (citing record evidence); *see also* Complaint Counsel's Post Trial Proposed Findings of Fact and Conclusions of Law ¶¶ 159-173 (Apr. 25, 2011). By declining to choose the best interpretation of "[r]emoves stains," the Commission respected the prerogative of North Carolina's courts to determine the meaning of North Carolina law. *Cf. Town of Hallie*, 471 U.S. at 44 ("Requiring [too] close examination of a state legislature's intent to determine whether the federal antitrust laws apply [under the clear-articulation prong] would . . embroil the federal courts in the unnecessary interpretation of state statutes.").

potential state remedies to rein in a rogue agency would not immunize the agency if it acted without any clear articulation, the existence of potential state remedies to protect against "over-enforcement" would not immunize it either. And that is because potential remedies are not dispositive of "whether the State has exercised sufficient independent judgment and control so that the details of the [restrictions on competition] have been established as a product of deliberate state intervention." *Id.* Thus, for example, the fact that the Supreme Court of Virginia *could* have rejected the State Bar's opinions condoning fee schedules did not warrant immunity because that did not make such schedules official state policy. *Goldfarb*, 421 U.S. 773.

Second, this is not a question of "'transform[ing] state administrative review into a federal antitrust job.'" *Omni*, 499 U.S. at 372 (quoting P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 212.3b, at 145 (Supp. 1989)). In this case "the Board *evaded judicial review* of its decision to classify teeth whitening as the practice of dentistry by proceeding directly to issue [unauthorized] cease and desist orders." Pet. App. 67a (emphasis added); *see N.C. State Bd. of Dental Examiners v. FTC*, 717 F.3d 359, 364, 366 (4th Cir. 2013) (describing Board's conduct as "extra-judicial" and noting that "the Board does not have the authority to discipline unlicensed individuals or to order non-dentists to stop violating the Dental

Practice Act"). This was no "ordinary" agency error[7] because it vitiated the very supervision designed by the State "to ensure that the Board's actions comply with state law," Pet'r Br. 7, and that would have determined whether excluding non-dentists from providing teeth whitening was in fact state policy.

Relatedly, the National Governors' Association (NGA) misses the mark with its argument that North Carolina's disclosure and ethics rules "already place restrictions on the actions of Board members that limit them from engaging in the self-interested behavior that concerned the FTC and the Fourth Circuit," NGA Amicus Br. 15, and that States in general "have adequate tools to ensure that board and commission members perform their duties appropriately and in a manner that upholds the public trust," *id.* at 18.

As an initial matter, the NGA's contention is belied by the facts of this case, in which North Carolina's ethics and disclosure laws did not stop the Board from engaging in anticompetitive self-interested behavior. *See Dental Examiners*, 717 F.3d

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[7] *See FTC v. Monahan*, 832 F.2d 688, 690 (1st Cir. 1987) (Breyer, J.) (suggesting that state-action immunity may depend in part on whether board activity was "inside or outside that area of agency autonomy involving ordinary agency errors or abuses in the administration of powers conferred by the state") (internal quote marks and brackets omitted). The Board acknowledged below that the cease and desist letters may have been "heavy handed." Pet'r Opening Br. 14 (July 19, 2012), 2012 WL 2931297.

at 375 ("[T]his case is about a state board run by private actors in the marketplace taking action outside of the procedures mandated by state law to expel a competitor from the market."). And neither the NGA nor petitioner suggests that board members' participation in a matter that excludes a group of competitors violates the State Government Ethics Act. *See* N.C. Gen. Stat. § 138A-38(a)(1) (officials may participate in an action if they receive a benefit "no greater than that which could reasonably be foreseen to accrue to all members of [their] profession"). Indeed, the whole thrust of the federalism argument advanced by petitioner and its other amici is that a State's sovereign choice to use unsupervised market participants as regulators must be respected, *regardless of conflicts of interest*. Pet'r Br. 48 ("'risk of self-interest' rationale . improperly questions the sovereign decision that the benefits of expert regulators outweigh the costs of actual or potential conflicts of interest"). And to the extent that board members' actions here did violate state ethics laws because their actions benefitted their teeth whitening practices, applying federal antitrust laws would complement state-law objectives and address the harm to the market that the ethics laws do not. *See* Pet. App. 60a-61a (issue under antitrust laws is not "official misconduct or unethical behavior but rather the incumbent dentists' efforts to exclude their competitors from a particular economic market" which "lies at the heart of the federal antitrust laws"). It is a commonplace that "federal rights should be regarded as supplementing state-created rights unless

otherwise indicated." *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 646 (1990). State remedies are "adequate" for state-action purposes only insofar as they satisfy the active-supervision requirement.

C. Active Supervision Does Not Require North Carolina to Alter Its Regulatory Structure

The argument of petitioner and amici that imposing an active-supervision requirement will require radical restructuring and "massive disruption" of state regulatory regimes is simply not true.[8] In this case, presumably it would have been sufficient for the Board to *follow* state law and refer the purported unauthorized practice of dentistry to the district attorney for prosecution or to initiate a civil suit seeking to enjoin the practice. *See* Resp't Br. 51 (active-supervision requirement "would likely have been satisfied if petitioner had exercised one of the powers that state law actually grants it"). Review by the courts of North Carolina *before* any exclusion

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[8] Nor is it the case that "[t]here is no principled basis for cabining the [risk of self-interest] rationale to agencies like the Board with part-time officials who are also current market participants, because there are myriad other ways that state regulators may be biased towards, or otherwise not independent from, regulated interests." Pet'r Br. 46-47. The distinction is that bias attributable to market participation is an objective economic fact, while other forms of bias, including regulatory capture, are more attenuated and would require probing the motives of state regulators.

occurs ordinarily would constitute active state supervision, provided that the reviewing court could "disapprove those [particular anticompetitive acts] that fail to accord with state policy." *Patrick*, 486 U.S. at 101; *see* Einer Elhauge, *The Scope of Antitrust Process*, 104 Harv. L. Rev. 667, 715 (1991) (cases support "the proposition that a disinterested politically accountable actor can immunize a restraint only by approving it before it inflicts any market injury"); Areeda & Hovenkamp, ¶ 226b, at 206 ("if there is no judicial procedure for testing a rule without violating it, unsupervised rules could have an in terrorem effect on competition").

This Court has not previously decided "whether judicial review of private conduct ever can constitute active supervision," *Patrick*, 486 U.S. at 104, and the FTC did not expressly decide the issue because "the Board evaded judicial review." Pet. App. 67a. However, the FTC's order permits the Board to seek to enforce its interpretation of the Dental Practice Act by going to court first. *See* Pet. App. 133a. And, as the Solicitor General points out, "That approach would have left to disinterested judicial officials the ultimate determination whether North Carolina law actually prohibits non-dentists from providing teeth whitening services." Resp't Br. 50. Had the Board gone to court, its interpretation of law presumably would have been subject to *de novo* review. *See generally* N.C. Gen. Stat. § 150B-51(c); *e.g.*, *N.C. Bd. of Dental Examiners v. Brunson*, No. 04-CVS-4267, slip op. at 6 (N.C. Super. Ct. Guilford Cnty. Mar. 7, 2005) (rejecting Board

contention that sale of cosmetic crown "fang" constituted unauthorized practice of dentistry, noting that the "[t]he extension of the definition of 'practice of dentistry' to include such devices is best left to the legislature") (CX0159).[9]

Other common forms of review of interested boards may also be sufficient. In North Carolina, for example, agency rules generally must be approved by a legislatively appointed Rules Review Commission to ensure that, among other things, proposed rules are necessary to implement state law, N.C. Gen. Stat. §§ 143B-30.1, 150B-21.9; approved rules may be

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[9] While judicial review before any market impact occurred likely would have been adequate state supervision here, as a general matter "limited" judicial review would not be sufficient. *Ticor*, 504 U.S. at 638-39; *Patrick*, 486 U.S. at 104-05 (judicial review of hospital peer review decisions would be inadequate state supervision if limited to making sure that procedure was reasonable and that there was evidence to support the decision). A court must be able "to determine whether [a board's] decisions comport with state regulatory policy and to correct abuses." *Patrick*, 486 at 101; *Ticor*, 504 U.S. at 634 ("sufficient independent judgment and control" must be exercised). Thus, review based on *Chevron* deference would be inadequate. However, like North Carolina, most states do not accord strong *Chevron* deference to their agencies' interpretations of state law. *See* D. Zachary Hudson, *Comment: A Case for Varying Interpretive Deference at the State Level*, 119 Yale L.J. 373, 374 (2009). And when an agency is financially interested in the result such deference would be dubious in any event under general principles of administrative law. *See Amalgamated Sugar Co. v. Vilsack*, 563 F.3d 822, 834 (9th Cir.), *cert. denied*, 558 U.S. 879 (2009); Timothy K. Armstrong, Chevron *Deference and Agency Self-Interest*, 13 Cornell J.L. & Pub. Pol'y 203 (2004).

further subject to judicial review under the State Administrative Procedure Act, *id.*, §§ 150B-4, -43.[10] Other States, including some of the state amici supporting the petitioner, have similar rules commissions. *See* Jerry L. Anderson & Christopher Poynor, *A Constitutional and Empirical Analysis of Iowa's Administrative Rules Review Committee Procedure*, 61 Drake L. Rev. 1, 16-26 (2012) (canvassing States).

The degree of supervision required will depend to some extent on the degree of discretion exercised by a board in implementing state law. A "clear and unambiguous" legislative restriction may not require any active supervision (or may *constitute* active supervision) because "[i]t is not left to the private sector to decide what the policy is or whether it is to be complied with." *Gambrel v. Kentucky Bd. of Dentistry*, 689 F.2d 612, 618, 619 n.3 (6th Cir. 1982); Pet. App. 56a; Areeda & Hovenkamp ¶ 226e, at 211-12.[11] Accordingly, a board may avoid antitrust risk by seeking an advisory opinion from the Attorney General that

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[10] Notably, North Carolina law bars agencies from adopting a rule that "[e]nlarges the scope of a profession, occupation, or field of endeavor for which an occupational license is required." N.C. Gen. Stat. § 150B-19(2).

[11] The Bar amici are thus plainly wrong when they say that state-action protection would be denied under the Fourth Circuit's ruling, "even had the General Assembly expressly required the Dental Board to send cease-and-desist letters with the very wording the Dental Board used." *See* N.C. State Bar Amicus Br. 7-8; *id.* at 11 (claiming that ruling means conduct that is mandated by state statute or the constitution would not be immune).

would clarify the law. *See* N.C. Gen. Stat. § 114-2; *e.g.* Office of the Attorney General of the State of N.C., Advisory Opinion: Dental Care and Business Services, 1999 WL 33265598 (Sept. 3, 1999) (responding to request of Dental Examiners as to whether particular business arrangement constitutes the unlawful practice of dentistry and for advice as to how such arrangements should be analyzed).[12]

In sum, no "redundant bureaucracy" need be added; no abandonment of using active professionals to staff licensing boards is required. Nor would "routine licensing decisions concerning professional competence" need to be subject to "pointed reexamination" for antitrust purposes. Pet'r Br. 35. Routine disciplinary decisions involving a local doctor, dentist or lawyer are unlikely to require active supervision because they ordinarily will not involve discretionary policy decisions or implicate the financial interests of board members. *See* Areeda & Hovenkamp, ¶ 227b, at 226 (presumption that market participants require active supervision is "rather weak where the

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[12] Other States that rely on boards with practicing members have different regulatory structures that may satisfy the active-supervision requirement. For example, Connecticut houses and supervises its occupational boards within its public health department, *see* Conn. Gen. Stat. § 19a-14 (2013), while Massachusetts places its health-related boards in the public health department and its other occupational boards in a division of professional licensure, Mass. Gen. L. c. 13, § 9; c. 112, § 1 (2014). *See* Resp't Br. 54-55 (canvassing various ways that States structure and supervise their dental boards).

competitive relationship between the decision maker and the plaintiff is weak and the potential for anticompetitive effects not particularly strong"); *cf. Rite Aid Corp. v. Bd. of Pharmacy*, 421 F. Supp. 1161, 1170 (D. N.J. 1976) (three-judge panel) (no basis for disqualification of board members "just by reason of their sharing the same profession as plaintiffs").[13] On the other hand, disciplinary actions that involve novel procedures or methods of doing business that pose a direct competitive threat to incumbents are exactly those that implicate the pecuniary interests of board members, *see Gibson*, 411 U.S. 564, but which petitioner maintains should be immune from antitrust scrutiny regardless of *any* disinterested supervision.

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[13] The Bar amici argue that the Fourth Circuit's opinion means that the North Carolina Bar will no longer be able to send out "cease-and-desist letters to inform individuals that they are practicing law without a license or in an unauthorized manner without the State Bar taking the risk that it is exposing its Councilors to personal liability under the antitrust laws," and this will "require that the State Bar sue individuals engaging in the unauthorized practice of law without warning rather than writing a cease-and-desist letter that may resolve the matter and avoid the cost and expense of filing lawsuits." N.C. State Bar Amicus Br. 17. This is silly. As noted above, routine disciplinary matters are unlikely to need active supervision. Moreover, "letters of caution," which the State Bar *is* authorized to issue in certain circumstances, 27 N.C. Admin. Code § 1D.0206(4), would not restrain trade if they were merely cautionary and not coercive. *See* Pet. App. 139a (order permits Board "to send bona fide litigation warning letters to targets of investigations").

D. Requiring Active Supervision Is Consistent with North Carolina's Constitutional Prohibition on Monopolies

In addition to its antitrust law that mirrors the Sherman Act, *see* N.C. Gen. Stat. § 75-1, North Carolina's Declaration of Rights declares that "monopolies are contrary to the genius of a free state and shall not be allowed," N.C. Const. art. I, § 34, and that "[n]o person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services," *id.*, § 32. The North Carolina Supreme Court has interpreted these constitutional provisions to mean that "[t]he Legislature cannot forbid one man to practice a calling or profession for the benefit or profit of another." *State v. Biggs*, 46 S.E. 401, 403 (N.C. 1903); *see also State v. Harris*, 6 S.E.2d 854, 858-59 (N.C. 1940) (police power of the State cannot be "farmed out to a private group to be used in narrowing the field of competition"); *accord King v. Town of Chapel Hill*, 758 S.E.2d 364, 371 (N.C. 2014) (recognizing "fundamental right to 'earn a livelihood'" (quoting *Roller v. Allen*, 96 S.E.2d 851, 854 (N.C. 1957))).

In several instances, the North Carolina Supreme Court has applied these (and other) provisions of the Declaration of Rights to strike down laws reserving certain services to licensed professionals, finding the laws not sufficiently justified by public safety concerns, particularly when exclusionary decisions were left to the professionals themselves. For example, in *Biggs*, 46 S.E. 401, the court held that the legislature had unconstitutionally attempted

to confer a monopoly by requiring all treatment of disease, real or imaginary, be provided by doctors, with certain narrow exceptions. The court explained, "Some M.D.'s doubtless believe that all treatment of disease, except by their own system, is quackery. Is this point to be decided by the M.D.'s themselves, through an examining committee of five of their own number, or is the public the tribunal to decide, by employing whom each man prefers ?" *Id.* at 403. In *Roller*, the court held that the licensure of tile contractors created an unlawful monopoly, finding it "[s]ignificant[that] all members of the licensing board must come from the industry." 96 S.E.2d at 857. And in *Harris*, the court held that licensing the business of dry cleaning created an unlawful monopoly, noting that where "power [is] given to interested members of the group to control admission to the trade [it] raises a suspicion as to its public purpose." 6 S.E.2d at 864.[14]

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[14] Professor Calabresi explains: "If a state licensing board is controlled by those who already work in the industry, the statute requiring occupational licensing is less likely to be upheld. This is because the board is more likely to promote a monopoly when the distribution of licenses is controlled by the same people who are already working in the industry. This rationale is the same as the rationale used in *Dr. Bonham's Case*," in which "the court struck down a patent granted by King Henry VIII, later confirmed by statute, which gave the Royal College of Physicians the power to impose fines on physicians who had not been licensed by the College to practice medicine," and to keep half of the fines. Steven G. Calabresi & Larissa C. Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 Harv. J.L. & Pub. Pol'y 983, 1086-87 (2013).

Likewise, the North Carolina Supreme Court has rejected an expansive interpretation of the unauthorized practice of optometry to include the mere duplication of lenses without a prescription, in recognition that "the exercise of the police power will not be upheld where its use tends only to create a monopoly or special privilege and does not tend to preserve the public health, safety, or welfare." *Palmer v. Smith,* 51 S.E.2d 8, 11 (N.C. 1948); *see also LegalZoom.com, Inc. v. N.C. State Bar*, No. 11-CVS-15111 (N.C. Super. Ct. Wake Cnty. Mar. 24, 2014), 2014 NCBC LEXIS 9, *77 (insofar as document preparation service did not constitute unauthorized practice of law, State Bar's effort to exclude it could give rise to constitutional claim of unlawful monopoly).

Thus, requiring active supervision here reinforces North Carolina's own constitutionally based skepticism towards occupational licensing controlled by self-interested industry participants and concern that such control may be used to exclude competition for the benefit of the industry rather than to promote the public welfare.

II. CONDITIONING IMMUNITY ON ACTIVE SUPERVISION WILL NOT IMPAIR STATE REGULATION OF THE HEALTH PROFESSIONS

The medical associations claim that subjecting unsupervised state regulatory boards to antitrust scrutiny would come at the expense of public health and deter qualified professionals from serving on regulatory boards. Am. Dental Ass'n (ADA) Amicus Br. 20-25. The claim is entirely implausible. For one thing, there is nothing inconsistent between the application of the antitrust laws and the protection of public health that regulatory boards are supposed to provide. Even entirely private professional self-regulation that reasonably protects legitimate public health concerns ordinarily does not violate the antitrust laws. *See Cal. Dental Ass'n v. FTC*, 526 U.S. 756 (1999) (ethical rule simply banning false or misleading advertising presumably would be lawful); *Dental Examiners*, 717 F.3d at 375 ("'certain practices by members of a learned profession might survive scrutiny even though they would be viewed as a violation of the Sherman Act in another context'" (quoting *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 686 (1978))) (ellipsis in original). The problem arises when professionals restrict competition to protect their wallets rather than to protect the public welfare, as the FTC found to be the case here, and the Fourth Circuit affirmed. *See* Pet. App. 120a-123a (finding that Board failed to establish public-safety defense and that there was no contemporaneous

evidence that the challenged conduct was motivated by health and safety concerns); 717 F.3d at 374 n.12.[15] And, as the FTC also found here, such exclusion has real costs, by unnecessarily raising prices to consumers and depriving them of choices they desire. *See* Pet. App. 131a; 717 F.3d at 374.

For another thing, the argument that the *risk* of being second-guessed by the FTC or an antitrust court will cause doctors or other professionals to allow competition where they otherwise believe it is harmful to public health or safety is far-fetched.[16] As

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[15] Judge Keenan disagreed on this point. *See* 717 F.3d at 377 (concluding that "the Board was motivated substantially by a desire to eliminate an unsafe medical practice," and that "the record supports the Board's argument that there is a safety risk inhering in allowing [non-dentists] to perform teeth-whitening services"). But petitioner failed to seek review of the Fourth Circuit's upholding the FTC's merits decision, so this Court must assume the FTC's findings as to the lack of a genuine safety risk are correct. *See Fort Stewart Schools v. Fed. Labor Rel. Auth.*, 495 U.S. 641, 652 (1990).

[16] The suggestion by some of the amici that board members would be exposed to criminal liability is even more outlandish. Not surprisingly, they do not cite any official who has ever suggested that professional self-regulation, whether by unsupervised boards or otherwise, could constitute the type of hard-core cartel activity that would warrant criminal prosecution. U.S. Dep't of Justice, Antitrust Division Manual III-12 (5th ed. 2014) ("Division policy is to proceed by criminal investigation and prosecution in cases involving horizontal, per se unlawful agreements such as price fixing, bid rigging, and customer and territorial allocations."), http://www.justice.gov/atr/public/divisionmanual/chapter3.pdf; *see* Pet. App. 104a (analyzing Board restraint under rule of reason).

long as the decision to exclude competition is adequately supervised, *see supra*, there is of course no risk of liability.[17] Moreover, if petitioner is correct, sovereign immunity would bar any damages claim against the Board.[18] *See* Pet'r Opening Br. 7 (July 19, 2012). And, as here, States are free to provide for the defense of, and indemnify, board members for any liability in their official or individual capacities. *See* N.C. Gen. Stat. §§ 143-300.3, -300.6. Finally, as here, boards may obtain private liability insurance "to cover all risks or potential liability of the board, its

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[17] The medical associations give the example of a state medical board that might adopt a rule that *permits* non-physician clinicians to perform certain services, even though it would pose significant risks to the public, out of fear that excluding such clinicians could expose the board and its members to antitrust charges. ADA Amicus Br. 20-21. They do not explain why, if the "recognized standing and integrity" of board members (*id.* at 24) will prevent them taking into account their own competitive financial interests in deciding what constitutes harm to the public, they would be swayed to compromise their integrity by the possible exposure to baseless antitrust charges.

[18] The medical associations argue, "Although the members of a state regulatory board may be immune from suit for their official actions under the Eleventh Amendment, they might reasonably fear that sovereign immunity will be denied." ADA Amicus Br. 23 n.9. However, they do not mention that the case they cite, *Versiglio v. Bd. of Dental Exam'rs of Ala.*, 651 F.3d 1272 (11th Cir. 2011), which denied sovereign immunity to a regulatory board, was subsequently vacated by the Eleventh Circuit. *See Versiglio v. Bd. of Dental Exam'rs of Ala.*, 686 F.3d 1290 (11th Cir. 2012). The Eleventh Circuit reversed itself because its original decision relied on an Alabama intermediate court's determination that the board was not "an arm of the state," which was reversed by the Alabama Supreme Court.

members, officers, employees, and agents."[19] N.C. Gen. Stat. § 93B-16(a). In short, state boards should have no reason to pull their legitimate punches for fear of personal liability.

Petitioner and its amici quote *Hoover*'s observation that "the threat of being sued for damages – particularly where the issue turns on subjective intent or motive – will deter 'able citizens' from performing this essential public service." *Hoover v. Ronwin*, 466 U.S. at 580. Yet there is no evidence that fear of liability for antitrust violations has impacted States' recruitment of board members even though the case law has long suggested that financially self-interested boards are subject to *Midcal*'s active-supervision requirement. *See, e.g., FTC v. Monahan*, 832 F.2d 688, 689 (1st Cir. 1987); *see also* Br. for the U.S. as Amicus Curiae Supporting Respondent, *Town of Hallie*, 471 U.S. 34 (No. 82-1832), 1984 WL 564129, *21 n.18 ("[T]here may be a need for 'active supervision' where the subordinate state instrumentality is composed – as were the committees in *Bates* and

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[19] The Bar amici argue that "liability insurance may not be available to mitigate the risks and defray the costs of defending these claims," but offer no support other than citing *Rose Acre Farms, Inc. v. Columbia Cas. Co.*, 662 F.3d 765, 769 (7th Cir. 2011), a case in which the court found that an antitrust claim was not covered as "advertising injury" under a commercial general liability policy. N.C. State Bar Amicus Br. 16. However, antitrust claims are often covered under other types of policies. *See, e.g., William Beaumont Hosp. v. Fed. Ins. Co.*, 552 Fed. Appx. 494 (6th Cir. 2014) (express coverage for antitrust claim not inconsistent with public policy).

Ronwin – of members of the regulated business."). Moreover, the absence of *any* potential liability, even for injunctive relief, may have a "liberating effect" in the other direction by encouraging unsupervised state boards to indulge their financial and professional interests to restrict competition in ways neither intended by the State nor supported by genuine public welfare concerns. That may be why *Hoover* did not offer state bars "absolute" state-action immunity. On the contrary, *Hoover* made clear that immunity rested on the control of the relevant decision by the State Supreme Court,[20] and that ordinarily "nonsovereign state representatives" qualify for the state-action defense only if they act "pursuant to a 'clearly articulated and affirmatively expressed state policy' to replace competition with regulation" *and* "the degree to which the state legislature or supreme court supervises its representative [is] relevant to the inquiry." 466 U.S. at 569 (citing *Midcal* and *Goldfarb*).

CONCLUSION

The decision of the Fourth Circuit and the FTC does not call into question the use of active professionals in regulating the professions. Their expertise no doubt redounds to the public benefit. But as

[20] The Court emphasized the limited effect of its decision, noting, "Our attention has not been drawn to any trade or other profession in which the licensing of its members is determined directly by the sovereign itself – here the State Supreme Court." *Hoover*, 466 U.S. at 580 n.34.

market participants, active professionals also have a financial interest at stake, particularly when it comes to deciding what services must be performed by the professionals themselves, and what services can safely (and more cheaply) be performed by unlicensed providers, such as the teeth whitening clinics at issue here. The only thing the Fourth Circuit and the FTC ruling calls into question is whether practicing members of a profession (or of other occupations) may restrict competition without any meaningful review by a disinterested public official to ensure that such restrictions comport with state policy, *and* nonetheless escape any scrutiny of the federal antitrust laws. The FTC's answer to that question should be affirmed. Antitrust exemption is appropriate only when a financially self-interested board's discretionary decision to restrict competition is subject to meaningful review before any market impact, regardless of how the board is selected.

Respectfully submitted,

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Dated: Aug. 6, 2014

AMICUS CURIAE BRIEF

No. 13-534

IN THE

Supreme Court of the United States

THE NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE AMERICAN ASSOCIATION OF NURSE ANESTHETISTS, AMERICAN NURSES ASSOCIATION, AMERICAN ASSOCIATION OF NURSE PRACTITIONERS, AMERICAN COLLEGE OF NURSE MIDWIVES, NATIONAL ASSOCIATION OF CLINICAL NURSE SPECIALISTS, AND THE CITIZEN ADVOCACY CENTER AS *AMICI CURIAE* IN SUPPORT OF THE RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are national associations of nursing professionals, including associations of advanced practice registered nurses with areas of practice in anesthesia, primary care, acute care, mental health, labor and delivery and other specialties. Advanced practice registered nurses ("APRNs") have extended their formal academic and clinical education with masters or doctoral degrees in their area of expertise and evaluate, diagnose and treat patients and prescribe medications as part of their advanced nursing practice.

These nursing associations are dedicated to fostering the professionalism and quality of the nursing profession, generally, and of their respective area of nursing practice and facilitating access to nursing care by promoting the ability of member nurses to safely practice to the full extent of their professional training and education. Members of *amici* nursing associations are both regulated by and often serve on boards of nursing in the 50 states and the District of Columbia.

- American Association of Nurse Anesthetists, founded in 1931, is the professional association representing nearly 47,000 Certified Registered Nurse

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[1] Petitioner and Respondent filed with the Clerk of the Supreme Court letters granting blanket consent to the filing of *amicus* briefs. *Amici* certify pursuant to Rule 37.6 that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* organizations or their counsel has made any monetary contribution intended to fund preparation or submission of this brief.

Anesthetists ("CRNAs") and student registered nurse anesthetists nationwide. CRNAs administer anesthesia and provide pain management care.

- The American Nurses Association (ANA) is the only full-service professional organization representing the interests of the nation's 3.1 million registered nurses through its constituent and state nurses associations and its organizational affiliates. ANA advances the nursing profession in furtherance of its mission to improve health for all by fostering high standards of nursing practice, promoting the rights of nurses in the workplace, projecting a positive and realistic view of nursing, and lobbying the Congress and regulatory agencies on health care issues affecting nurses and the public.

- American Association of Nurse Practitioners is the largest professional membership organization for nurse practitioners ("NPs") of all specialties, representing NP students and more than 192,000 NPs practicing in the United States today.

- American College of Nurse Midwives ("ACNM") is the national professional association representing 11,000 certified nurse-midwives and certified midwives licensed in all 50 states and the District of Columbia to provide both maternity and

primary care services. With roots dating to 1929 and formal incorporation in 1955, ACNM is the oldest women's health care organization in the U.S.

- National Association of Clinical Nurse Specialists, founded in 1995, is the only association representing clinical nurse specialists ("CNSs"), advanced practice registered nurses who work in a variety of specialties to ensure high-quality, evidence-based, patient-centered care. As leaders in health care settings, CNSs provide direct patient care and lead initiatives to improve care and clinical outcomes and to reduce costs.

Amici nursing associations are concerned about actions of state healthcare professional regulatory boards that impact the ability of nursing professionals to practice to the fullest extent of their professional training and education. Unnecessary restrictions on the practice of any qualified healthcare provider limit patient access to quality care, may increase cost and can compromise the quality of healthcare delivery. The need to provide access to quality and cost effective healthcare is imperative to meet the growing healthcare needs of our aging population. Ensuring that healthcare professionals are working to the full extent intended by the states and without impermissible anticompetitive interference is vital to addressing those public health challenges.

Amici nursing associations are joined in this brief by the Citizen Advocacy Center ("CAC"), a non-profit,

non-partisan organization whose mission is to increase the accountability, transparency and effectiveness of state healthcare professional regulatory boards and national voluntary certification organizations by offering training, research and networking opportunities for public members serving on these entities. The CAC supports efforts to review unjustifiable anticompetitive business restrictions imposed by state healthcare professional regulatory boards that harm consumers.

SUMMARY OF ARGUMENT

This Court's jurisprudence requires that private parties vested by the state with regulatory authority to limit competition must act both in keeping with a "clearly articulated and affirmatively expressed" state policy to displace competition and be subject to "active state supervision" in order to be insulated from antitrust review by state action immunity. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980). The Fourth Circuit decision correctly applied this Court's precedent to find that the North Carolina Board of Dental Examiners (the "Dental Board"), composed of a majority of practicing dentists elected exclusively by other practicing dentists, was not entitled to state action immunity in light of the failure of the state to actively supervise the Dental Board. *N.C. State Bd. of Dental Exam'rs v. FTC*, 717 F.3d 359, 375 (4th Cir. 2013).

When a sovereign state chooses to delegate regulatory authority to private economic actors, the doctrine of state action immunity requires a closer examination of the true nature of the state sanctioned entity and active review by the state of its activities.

FTC v. Phoebe Putney Health Sys., Inc., 133 S. Ct. 1003, 1010 (2013) ("Accordingly, '[c]loser analysis is required when the activity at issue is not directly that of the State itself, but rather 'is carried out by others pursuant to state authorization.'" (quoting *Hoover v. Ronwin*, 466 U.S. 558, 568 (1984))). A state may not authorize private parties to effect anticompetitive results under the guise of a state regulatory regime without providing active supervision of those activities. *See Midcal*, 445 U.S. at 105, 106. Reversing the Fourth Circuit decision and affording the Dental Board immunity would permit states to cede regulatory authority to private economic actors, armed with the immunity reserved for government actors, without any state review of their activities or even of the selection of those parties, thus permitting professionals in private practice, not elected by or accountable to the general public, to direct the regulatory policy of the state consistent with the economic interests of their profession, rather than the overall public welfare.

Petitioner contends that the designation of the Dental Board under North Carolina statute as a "state agency," cannot be disrupted and is dispositive of whether the Dental Board is a "state actor" for purposes of state action immunity. Under this view of the case, every state regulatory board denominated a "state agency," regardless of its composition, organization or powers, would be entitled to immunity provided it was acting pursuant to a clearly articulated state policy to displace competition. *Phoebe Putney*, 133 S. Ct. at 1010. Such a holding would enfeeble federal antitrust principles by insulating the activities of all state regulatory boards, regardless of their composition, which

are, by definition, acting under a state regime to displace competition.

Precedent does not permit such a broad exception to federal antitrust policy. This Court firmly rejects formalistic approaches to determining whether an actor is a "state actor," and does not permit labels issued by the state or private parties to control its determinations. *See Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 190-93 (2010) (courts consider "the identity of the persons who act, rather than the label of their hats"); *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 39 (1985) (explaining that "state action is not a purely formalistic inquiry"); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 789-90 (1975). Nor is there any serious federalism issue in a critical examination of a state's labeling of a privately staffed body as a "state agency." In *Goldfarb*, the Virginia State Bar was denied state action immunity despite the Court's recognition that it was "a state agency by law." *Goldfarb*, 421 U.S. at 789-90. The fact that a state-created body may be "a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members." *Id.* at 791.

Even where the challenged actions of the Arizona State Bar Association were authorized by the Arizona Supreme Court and were undisputedly "acts as the agent of the [state] [Supreme] court," this Court required and relied on the fact that the rules at issue were "subject to the pointed re-examination by the policymaker the Arizona Supreme Court." *Bates v. State Bar of Ariz.*, 433 U.S. 350, 361-62 (1977). In affording state action immunity to the Arizona State Bar enforcing disciplinary rules concerning advertising, this Court "deem[ed] it

significant that the state policy is so clearly and affirmatively expressed and that the State's supervision is so active." *Id.* at 362; *see Midcal*, 445 U.S. at 104-05 (referencing relevance of the "pointed re-examination" by the Arizona State Supreme Court in *Bates* in support of imposing the "active state supervision" test for private activities). As found below, and not contested on appeal, no such "pointed re-examination," or any examination, was made by the state of the Dental Board's activities in this case. *N.C. Bd. of Dental Exam'rs*, 717 F.3d at 370.

The Fourth Circuit decision appropriately reflects the longstanding principle that state action immunity is disfavored, in view of the clear mandate of the federal antitrust laws to preserve competition. *See Phoebe Putney*, 133 S. Ct. at 1010 ("[G]iven the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws, 'state-action immunity is disfavored, much as are repeals by implication.'" (quoting *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992))). Undue concern for federalism or for the impact on board decision making need not outweigh the imperative of protecting competition, despite suggestions by *amici* in support of Petitioner who contend that affirming the decision will distort board decision making and impose impossible challenges on the states. States can and should continue to engage professionals on their regulatory boards while providing oversight to determine that the boards are correctly effecting the broad economic and regulatory policies of the state legislatures.

This Court should affirm the Fourth Circuit decision for the following four reasons:

First, the Fourth Circuit correctly identified the Dental Board, consisting of a majority of privately elected practicing dentists, as a private actor, under this Court's precedent requiring an examination of the nature of any state-created regulatory entity and of the economic interests of those controlling the entity. *See, e.g., FTC v. Ticor Title Ins. Co.*, 504 U.S. 621 (1992) (analyzing state authorized rating bureaus operated by title insurance companies as private actors under *Midcal* test); *S. Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985) (reviewing state authorized rate bureaus composed of motor common carriers as private actors under *Midcal* test). Unsupervised state regulatory boards constituted with a majority of practicing professionals and interpreting broadly-worded statutes have a tendency to act in their own economic self-interest to protect their competitive position in a manner not intended to be authorized by the state. Practicing healthcare professionals are no less "private actors" than the lawyers at issue in *Goldfarb* or the wine wholesalers in *Midcal*. This Court has refused to adopt an exemption for the "learned professions" or to otherwise presume that professionals act in the public's interest or that they lack the profit motive of non-professional market participants. *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 696 (1978) (rejecting special standards for rule of reason in evaluating ethical cannons of learned profession claimed to protect public safety); *Goldfarb*, 421 U.S. at 786-88 (rejecting learned professions exemption and acknowledging that professions act in "trade or commerce").

Second, the Fourth Circuit correctly declined to treat the Dental Board as akin to a municipality, which

this Court determined in *Hallie* need not be actively supervised by the state when it is acting pursuant to a "clearly articulated state policy to replace competition." *Hallie*, 471 U.S. at 47. The Court's holding in *Hallie*, dispensing with proof of "active state supervision" for the activities of municipalities, has no application to a regulatory board that is elected and controlled by a majority of private market participants. These regulatory boards do not possess the characteristics of local government that provide additional assurance that the board, like a municipality, will act in the public interest, as opposed to the private economic interest of their trade or profession. *See id.* at 45 n.9, 46-47.

Third, concerns stated by *amici* supporting Petitioner that "active state supervision" will compromise the integrity or soundness of board decisions, threaten public safety or otherwise be impractical are unfounded. In the healthcare area, state departments of health or similar state agencies possess ample expertise to evaluate the decisions of healthcare professional regulatory boards. States already recognize the value of involving non-professionals in the decisions of these boards, often requiring consumer and public representatives without healthcare experience to sit on boards of medicine and boards of nursing. While *amici* nursing associations and the CAC recognize the vital role that practicing professionals play on regulatory boards, they disagree with *amici* supporting reversal that "active state supervision" is impracticable. Several states already provide for oversight of boards of nursing by a state agency. *See* discussion *infra* Part IV. State supervision of regulatory boards offers the advantage of fostering communication between practitioner staffed

boards and the state to ensure that the board acts in the best interest of the public.

Amici's arguments that state oversight will be an interference with the activities of professional regulatory boards miss the point. *Amici* nursing associations and the CAC concede the value of optimal policymaking, but the inquiry, for purposes of state action immunity, is not whether the state regulation satisfies a normative standard of quality. The limited purpose of "active state supervision" is to corroborate that the action of an entity operated by private parties is the action of the state. *Ticor Title*, 504 U.S. at 634-35. It turns federalism principles on their head to contend that the state could "interfere" with its own policy. The very federalism concerns that *amici* supporting reversal raise dictate the necessity of assuring that the activities of privately controlled regulatory boards are consistent with the will of the sovereign state.

Fourth, claims that competitors or consumers are adequately protected from the activities of boards controlled by market participants by virtue of government ethics laws and state administrative procedures acts are illusory. These statutes are not directed toward the protection of competition and do not provide assurance that board activity is consistent with the state's policy to displace competition. Federal competition policy should not be surrendered to the vagaries of the state standards which provide no meaningful protection against unwarranted anticompetitive activities of regulatory boards.

ARGUMENT

I. ABSENT "ACTIVE STATE SUPERVISION," MAJORITY STAFFED PROFESSIONAL BOARDS MAY ACT ANTICOMPETITIVELY IN A MANNER NOT CONTEMPLATED BY THE STATE.

A. Regulatory Boards Possess Extensive Powers to Interpret Broad Statutes Affecting the Scope of Practice of Multiple Healthcare Professionals Who Share Increasingly Overlapping Expertise and Scopes of Practice.

In the healthcare area, state professional boards are vested with extensive powers to affect the right of healthcare professionals to practice and to define the scope and conditions of their practice. Generally, these boards are called upon to interpret and enforce statutes governing the scope of practice ("practice acts") and the licensing of one or more classes of healthcare professionals. In most states, boards may effect that responsibility through formal disciplinary actions and rulemaking and through less formal advisory opinions, policy statements and guidelines that they issue. Many states also provide for criminal penalties for the unauthorized practice of healthcare service. *See, e.g.*, Conn. Gen. Stat. § 20-102 (felony or fine); N.C. Gen. Stat. § 90-40 (misdemeanor); 63 Pa. Stat. Ann. § 223(a)-(b) (misdemeanor with option of civil penalties); Utah Code

Ann. § 58-31b-503(1)-(3) (third-degree felony or misdemeanor); W. Va. Code § 30-7-13 (misdemeanor).

In discharging these duties, healthcare professional boards are frequently required to interpret broadly-worded practice acts for the particular professional discipline. *See* Robert Cunningham, *Tapping the Potential of the Health Care Workforce: Scope-of-Practice and Payment Policies for Advanced Practice Nurses and Physician Assistants*, Nat'l Health Pol'y Forum 10 (2010) (referencing "vague" scope of practice statutes "open to a wide range of interpretations").[2] Increasingly, healthcare providers are expanding their educational and professional capabilities to provide additional treatments or services, and new types of providers are being recognized who provide similar services as existing market participants. *See* Catherine Dower & Leonard Finocchio, *Viewpoint on Health Professions Regulation: Strengthening the Links Between the Public Health Community and Health Professional Regulation*, Pub. Health Rep., Sept.-Oct. 1999, at 424 ("Traditional boundaries between the professions have blurred. This evolution has been driven largely by the non-physician professions seeking expanded practice authority and innovation in the workplace. "); Inst. of Med. of the Nat'l Acads., *The Future of Nursing: Leading Change, Advancing Health* 97 (2011) [hereinafter IOM Report] ("[T]he education and role of APRNs have continually evolved so that nurses now enter the workplace willing and qualified to provide more services than they previously did.").

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[2] *Available at* http://www.nhpf.org/library/background-papers/BP76_SOP_07-06-2010.pdf.

Where professional expertise overlaps, one professional board may render a decision regarding its scope of practice which has the effect of foreclosing other healthcare professionals from providing the service or treatment at issue. Overlapping expertise is particularly prominent between advanced practice registered nurses and physicians and a subject of dispute between these healthcare professionals. *See* Dower & Finocchio, *supra*, at 422 (acknowledging scope of practice disputes between APRNs and physicians); IOM Report, *supra*, at 97 ("As the services supported by evolving education programs expanded, so did the overlap of practice boundaries of APRNs and physicians.").

In interpreting scope of practice statutes, boards of medicine may, for example, declare a treatment or diagnostic test "the practice of medicine," thereby effectively excluding nurses in general, and specifically APRNs, from providing the same service, in cases where the nurses are educated, qualified and otherwise permitted by nursing statute or regulation to offer the service. Alternatively, boards of medicine may require that licensed physicians "supervise" or "direct" nurses where state law does not otherwise require such "supervision" or "direction." Even this more limited restriction severely constrains the ability of consumers to fully and directly access quality healthcare services from nursing professionals and inhibits nurses from practicing their profession to the full extent of their training and education. *See* Dower & Finocchio, *supra*, at 423 (unnecessary limitations on the scope of practice of healthcare professions limits access at a time that "there are thousands of federally and state-designated health manpower shortage areas across the country today"); FTC, *Policy Perspectives: Competition and the*

Regulation of Advanced Practice Nurses 20-33 (2014) (recognizing that excessive supervision requirements imposed on APRNs exacerbate provider shortage areas and may increase costs and hamper innovation);[3] IOM Report, *supra*, at 98-103 (discussing barriers created by on-site physician oversight or supervision requirements).

Where a majority practitioner staffed board is not overseen by an independent state agency or official, board decisions regarding the scope of practice for healthcare professionals are a means of improperly limiting competition beyond the contemplation of the state legislature. This may be particularly true in healthcare, where new treatments, diagnostics, devices and procedures are always being developed and where new healthcare disciplines are recognized or staffing models are being tested in order to address the expanding healthcare needs of our population. *See* IOM Report, *supra*, at 107 ("Practice boundaries are constantly changing with the emergence of new technologies, evolving patient expectations, and workforce issues."). Professional boards are often called upon to determine whether a healthcare practitioner may utilize the new technology or provide the new treatment, under circumstances where the state legislature has never considered the scope of practice question with respect to the particular innovation. Without active state review, professional boards often have no clear guide for applying the practice act to a new development and have a strong incentive to impose an anticompetitive result curtailing patient access to other health care professionals who offer the same care. This

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[3] *Available at* http://www.nacns.org/docs/FTC140307aprn policy.pdf.

decision to limit access to healthcare providers is often one that lawmakers did not consider and would not themselves have authorized.

Aside from formal statutory interpretation of scope of practice and licensing acts, healthcare professional boards may also utilize their powers to investigate or to issue advisory opinions, policy statements and guidelines to effect an anticompetitive result not consistent with the state's legislative intention. These informal, but permissible, board actions can have the same practical effect as an official rulemaking or decision because malpractice insurance carriers, health insurance companies, hospitals and other healthcare facilities frequently follow such informal guidance from boards by incorporating the standards into their credentialing, privileging and conditions of coverage. *See* IOM Report, *supra*, at 102 ("Credentialing and payment policies often are limited to state practice laws."). When a healthcare provider cannot obtain required malpractice insurance or is not permitted to practice at a facility or participate in a provider network, as a result of an unofficial action of the board, the action has the same impact as an official board ruling that restricts or limits competition. Even without adoption by other healthcare entities, these unofficial standards may have an *in terrorum* effect on the healthcare professionals being regulated, forcing them to self-adopt a requirement that limits competition for fear of disciplinary action. As discussed *infra* in Part III, these informal board activities are particularly pernicious since they often avoid any material public review or comment and are not usually amenable even to procedural challenge under the state's administrative procedures act.

B. Professional Regulatory Board Actions Can Restrain Competition from Qualified Competing Providers.

As the findings in this case reflect, unreviewed board activities falling short of rulemaking or an appealable adjudicatory decision can and do have the effect of forcing competitors in the healthcare field to exit the market. *N.C. Bd. Dental Exam'rs*, 717 F.3d at 365. Cease and desist letters of the sort utilized in this case are an example of the sort of board activity that has the capacity to automatically thwart competition without legal challenge. A party receiving such a letter reasonably may conclude that they face an immediate threat of disciplinary action or criminal penalty. Options for avoiding these consequences are limited and expensive. Administrative procedure acts do not typically provide a right of review of a cease and desist letter, and where state law affords an action for declaratory judgment, the expense and uncertainty of undertaking that litigation is sufficient itself to forestall the competitive healthcare provider.

Professional boards are well aware that the threat of criminal penalties or disciplinary action is a potent weapon for eliminating competitors. Members of *amici* nursing organizations have firsthand experience with the impact of cease and desist letters and investigations of physicians and nurses which cause nurses in general, and specifically APRNs, to cease providing certain types of care within their scope of practice or which cause physicians to disassociate from nurses providing the service, even without a board hearing. Healthcare

professionals often choose to stop practicing in an area of their expertise when faced with such allegations to avoid the financial costs of legal representation, the disruption to other elements of their practice, or the potential harm to their reputation as a result of a board hearing.

This Court has recognized the danger that private professional, trade or industry guilds or boards will not only be concerned with public safety issues, but may at the same time act to protect their members' positions *vis a vis* competitors, including by restricting those competitors from the marketplace. As noted by Justice Stevens:

> A potential conflict arises whenever government delegates licensing power to private parties whose economic interests may be served by limiting the number of competitors who engage in a particular trade. In fact, private parties have used licensing to advance their own interests in restraining competition at the expense of the public interest.

Hoover v. Ronwin, 466 U.S. 558, 584 (1984) (Steven, J., dissenting) (citing Walter Gellhorn, *The Abuse of Occupational Licensing*, 44 U. Chi. L. Rev. 6 (1975)).

Independent studies of healthcare regulatory boards have also observed the tendency of such boards to make decisions, not otherwise sufficiently justified by safety concerns, to entrench and protect the power of the profession being regulated at the expense of patients and potential competitors. *See* Dower & Finocchio, *supra*, at 422; Gary L. Gaumer, *Regulating Health Professionals:*

A Review of the Empirical Literature, Milbank Memorial Fund Q./Health and Soc'y, Summer 1984, at 408-09 (referencing "overwhelming support[] in the literature, that the public interest will continue to be compromised in favor of professional interests as long as boards are dominated by professions"); Taskforce on Health Care Workforce Regulation, Pew Health Professions Comm'n, *Strengthening Consumer Protection: Priorities for Health Care Workforce Regulation* 2 (1998) [hereinafter Pew Taskforce Report] ("The ostensible goal of professional regulation—to establish standards that protect consumers from incompetent practitioners—is eclipsed by a tacit goal of protecting the professions' economic prerogative.").[4]

The negative impact of scope of practice decisions by healthcare professional boards on patient access to competing health providers with overlapping expertise and on innovation in healthcare delivery has been widely recognized. IOM Report, *supra*, at 102 ("Current laws are hampering the ability of APRNs to contribute to innovative health care delivery solutions."); *see* AARP, *AARP 2010 Policy Supplement: Scope of Practice for Advanced Practice Registered Nurses* (2010). (In March 2010, the board of directors of AARP concluded that statutory and regulatory barriers at the state and federal levels are short-changing consumers.);[5] Dower & Finocchio, *supra*, at 423. Patients are harmed where access to care is unnecessarily restricted, particularly in

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[4] *Available at* http://futurehealth.ucsf.edu/Content/29/1998-12_Strengthening_Consumer_Protection_Priorities_for_Health_Care_Workforce_Regulation.pdf.

[5] *Available at* https://flanp.org/files/2010-AARPPolicySupplementScopeofPractice.pdf.

rural areas or where the shortage of primary care physicians is acute. In its 2011 report on "The Future of Nursing," the Institute of Medicine urged states to closely examine their scope of practice laws to afford the broadest possible use of nursing professionals in our healthcare system and noted that states removing artificial barriers "have experienced no deterioration of patient care." IOM Report, *supra*, at 9-11, 114. *Amici* nursing associations acknowledge the state's prerogative to limit competition in nursing practice or other healthcare disciplines, but absent "active state supervision," decisions of majority practitioner staffed boards pose the risk that competition will be impaired beyond what was intended by the states, exacerbating problems of access to quality healthcare or unnecessarily increasing costs as a result of reduced competition in the healthcare market. A considered review by state authorities responsible for public healthcare budgets is vital to addressing public health needs efficiently and safely by maximizing competitive workforce options where possible.

C. The Danger of Anticompetitive Board Actions Arises Where Market Participants Control the Board Irrespective of the Method of Their Selection.

Amici nursing associations and the CAC agree with views expressed by *amici* supporting reversal that any anticompetitive danger identified in the Fourth Circuit decision arising from majority practitioner staffed boards is present irrespective of the method of

selection of those members.[6] The fact that the members of the Dental Board were elected exclusively by fellow market participants without any state involvement underscores the purely private nature of the Dental Board, but private election is not essential to creating the risk that a practitioner staffed board will work to protect its own economic interest at the expense of competition and the public welfare. Market participants have an interest in protecting their own competitive position whether elected by peers or appointed by a government official.

In fact, the form of private selection of the Dental Board members is rare in the context of medical and nursing boards. Only one state board of medicine (Alabama) is constituted through elections by practicing physicians, and only one state board of nursing (North Carolina) provides for private election by nursing professionals. *See* Fed'n of State Med. Bds., *U.S. Medical Regulatory Trends and Actions* 45 (2014) [hereinafter FSMB *Trends and Actions*];[7] Nat'l Council of State Bd. of Nursing, *Board Structure* 13-14 (2012) [hereinafter NCSBN *Board Structure*].[8] Much more common are medical and nursing boards constituted by Governor appointment. Nearly all state boards regulating registered nurses and state boards of medicine are constituted with a majority of practicing

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[6] *See* Brief for Federation of State Boards of Physical Therapy et al. as Amici Curiae Supporting the Petitioner at 12; Brief for North Carolina State Bar et al. as Amici Curiae Supporting the Petitioner at 18-19; Brief for State of West Virginia and 21 Other States as Amici Curiae Supporting the Petitioner at 11 n.20.

[7] *Available at* http://www.fsmb.org/Media/Default/PDF/FSMB/Publications/us_medical_regulatory_trends_actions.pdf.

[8] *Available at* https://www.ncsbn.org/Board_Structure.pdf.

professionals, appointed by the Governor.[9] *See* FSMB *Trends and Actions*, *supra*, at 43, 45; NCSBN *Board Structure*, *supra*, at 7-9. In order to fully address the underlying risk that these boards may take anticompetitive action not reflective of the state's intended policy, *amici* nursing associations and the CAC urge that the Fourth Circuit's decision be affirmed in a manner that recognizes the risk of board activity where the board is controlled by a majority of market participants, irrespective of the method of their selection.

At a minimum, however, the Fourth Circuit decision must be affirmed to the extent it applies to state regulatory boards that are controlled by market participants who are elected to serve by their peers, themselves market participants, without any state involvement in the selection process. Petitioner does not contest for purposes of this appeal that whatever minimal state procedural rules or standards apply to the Dental Board, those mechanisms do not constitute "active state supervision" under this Court's jurisprudence. Brief of Petitioner at 9. Granting the Dental Board the benefits of state action immunity would run directly counter to precedent forbidding the state to surrender regulatory authority to private parties with an economic interest in the regulations without maintaining active oversight. *See, e.g.*, *Ticor Title*, 504 U.S. at 633-35; *Midcal*, 445 U.S. at 105.

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[9] According to statistics calculated using the data in NCSBN *Board Structure* and FSMB *Trends and Actions* surveys, greater than ninety-five percent of both state boards regulating registered nurses and state boards of medicine are composed of a majority of those practicing in the profession and are Governor appointed.

II. MAJORITY STAFFED PROFESSIONAL BOARDS DO NOT POSSESS THE SALIENT ATTRIBUTES OF A MUNICIPALITY.

The Fourth Circuit declined to apply the holding in *Hallie* to the activities of the Dental Board because it found *Hallie* "inapplicable . where the 'state agency' is composed entirely of private market participants." *N.C. Bd. of Dental Exam'rs*, 717 F.3d at 367 n.4. Petitioner urges this Court to reverse that holding to treat a majority practitioner staffed board as a sub-state authority equivalent to a municipality. *Amici* nursing associations and the CAC disagree with Petitioner that the test for "state action" set forth in *Hallie* is appropriately applied to majority practitioner staffed boards because municipalities and professional regulatory boards share few, if any, relevant attributes.

Hallie recognized that municipalities are distinguishable from other entities charged by the state with authority to regulate because "a municipality is an arm of the State." *Hallie*, 471 U.S. at 45. Contrasting municipalities with private parties who "may be presumed to be acting primarily on his or its own behalf," this Court concluded that it could presume "that the municipality acts in the public interest." *Id.* Salient to that determination was the acknowledgement that municipal activity "is invariably more likely to be exposed to public scrutiny than is private conduct" and that the electoral process "checked to some degree" activities of municipal officers. *Id.* at 45 n.9.

Practitioner staffed regulatory boards do not possess the same broad and competing interests as municipalities and are not subject to the same public accountability mechanisms. Unlike municipal officials, state board members are not publicly elected. Insofar as board members may be appointed by the Governor, the public is not generally knowledgeable about board appointments, and board appointments are highly unlikely to be determinative of, or even remotely relevant to, the average voter's decision in the polling booth. To presume any sort of indirect "electoral check" on board members would be folly.

Members of healthcare professional boards typically operate with significant independence from the state. The ties between part-time professional board members and the state are tenuous at best. As *amici* urging reversal have noted, members serving on professional boards often volunteer their time or are paid only a token amount for their service. They do not rely on the state for their livelihood. Market participant board members are private economic actors deriving their income from their own practice and effectively contributing their time to the board as an activity ancillary to their daily occupation.

Public review of professional board activities also differs significantly from the public's access to information regarding a municipality. State regulatory boards do not receive the sort of public attention and scrutiny as do municipal officials. Activities of professional boards, usually concerning the scope or standards of practice, licensing or discipline, rarely attract widespread public attention. While municipalities are regularly covered in the mainstream press,

professional board activities are not typically the subject of press coverage, except for trade press directed to the regulated practitioners.

Amici supporting Petitioner cite to the existence of certain reporting functions and open government requirements as a basis for analogizing a board to a publicly scrutinized municipality. While professional boards may be required to follow certain open meeting and procedural rules, in *amici's* experience, meetings of healthcare professional boards rarely attract any participants beyond the regulated professionals themselves. *See* Pew Taskforce Report, *supra*, at 10 ("Despite open meeting laws, board processes are generally unknown to the public."). Given the specialized nature of board issues, open meeting rules provide no meaningful opportunity or incentive for the public to act as a significant check on board actions.

Petitioner references the annual report of the Dental Board to executive branch officials of North Carolina as evidence that the Dental Board's activities qualify as "state action." Brief of Petitioner at 6-7. Typical board reporting requirements, like those in North Carolina, fail to provide the sort of prophylactic scrutiny necessary to justify the absence of "active state supervision." *See* N.C. Gen. Stat. § 90-44 (end-of-year reporting of fees, expenses, examinations and hearings); N.C. Gen. Stat. § 93B-2 (end-of-year reporting of licensure and examination statistics and general activities of the board). Statutes requiring regulatory board reports often provide no definition of required report content or, if they do, focus heavily on the reporting of statistics regarding licensure or finances. *See* Mass. Gen. Laws ch. 112, § 78 (unspecified reporting

on "condition of nursing"); Tenn. Code Ann. § 63-7-207 (unspecified reporting plus disclosure of receipts and disbursements). This sort of *ex post facto* annual reporting is not designed to forestall overreaching board decisions. Without mechanisms that insure meaningful substantive and contemporaneous review that permits corrections before enactment or enforcement of board actions, these reports do little to satisfy the need for state or public accountability of boards sufficient to warrant the abandonment of "active state supervision."

The rationale underlying this Court's decision in *Hallie* to relieve municipalities of showing "active state supervision" does not apply to majority healthcare practitioner staffed regulatory boards, consisting of self-elected or appointed market participants operating in a specialized and obscure area of state government without any meaningful public scrutiny, without sufficient public or government accountability or electoral check on their activities, and when the controlling board members owe their economic allegiance to their own professional practice, not the state.

III. CONSUMERS AND MARKET PARTICIPANTS ARE NOT PROTECTED FROM UNAUTHORIZED ANTICOMPETITIVE ACTIONS OF STATE BOARDS BY EXISTING PROCEDURAL STATUTES OR ETHICAL RULES.

Amici in support of reversal contend that the public is sufficiently protected from unauthorized anticompetitive actions of professional boards by virtue of state procedural laws and ethical standards governing board members. While these laws concededly police certain abuses of state professional boards, they are not designed to remedy and do not address concerns for preserving competitive markets.

Ethical standards that may be applicable to state board members are designed to protect against corruption and other behaviors that undermine the integrity of democratic processes, such as nepotism, bribery and self-dealing. *See* N.C. Gen. Stat. § 138A *et seq.* (requiring that officials exercise their authority honestly and fairly, free from impropriety, threats, favoritism and undue influence, and forbidding bribery and use of public position or information for private gain); *see also* Alaska Stat. § 39.52 *et seq.* (prohibiting action upon personal or financial interest, misuse of official position for personal gain, bribery and disclosure of private information); La. Rev. Stat. Ann. § 42:1101 *et seq.* (forbidding unauthorized practices, including bribery, nepotism and self-interested transactions); W. Va. Code Ann. § 6B-2-5 (forbidding use of public office for private gain, bribery and use of confidential

information for personal interests or interests of another). These ethical standards are intended to proscribe behavior that advances a person's individual financial interests, not to identify decision making that protects a general economic interest of the regulated group.

Nor do ethical rules examine issues of state policy or the scope of a regulatory board's authority. Insofar as these ethical canons are also cited as being indicative of board members' status as state officers, they provide no evidence that a board member acting consistent with state ethics standards is also actually effecting the policy of the state to displace competition. Private associations of healthcare providers also adopt ethical standards of practice that members are advised or required to follow. Those ethical standards no more insulate individual members from antitrust scrutiny than should governmental ethical standards. *See, e.g., California Dental Ass'n v. FTC*, 526 U.S. 756 (1999) (evaluating legality of ethical rules for advertising under FTC Act); *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. 679 (finding ethical rules regarding communications on price in violation of the Sherman Act); *Goldfarb*, 421 U.S. 773 (rejecting state action immunity for bar ethical rules setting minimum fees).

Like ethical canons, the utility of state administrative procedure acts to protect consumers or competitors from anticompetitive board activities is inherently circumscribed. Standing to challenge an agency action under these statutes is usually limited to appeals of final rules and final agency decisions. *See, e.g.*, Ark. Code Ann. §§ 25-15-207, 212; Mass. Gen. Laws ch. 30A, §§ 7, 14; W. Va. Code §§ 29A-4-2, 5-4. Falling

outside the purview of most administrative procedure acts are the very sorts of activities that worked to eliminate competition in this case.

A cease and desist letter, like the ones issued by the Dental Board, is neither a final agency decision nor a formal rulemaking with a corresponding right of review. Policy statements, guidelines or advisory opinions also generally carry no right of review but, nevertheless, can have a profoundly chilling effect or dramatic anticompetitive impact on the marketplace. These typical board activities escape the procedural requirements of notice, hearing and comment, imposed by most state administrative acts. When a policy statement or guidance places additional requirements or limitations on the practice of competitive healthcare providers, including requirements for "supervision," they are often adopted by healthcare facilities and insurers in a manner that proscribes competition but does not permit a challenge under administrative procedure acts. *See* N.C. Gen. Stat. § 150B-2 (excluding from the definition of reviewable "rule" any "nonbinding interpretive statements" or "statements of agency policy"). Administrative procedures acts are not, in any event, designed to address issues of competition, and often judicial review of agency action grants deference to the agency due to its presumed expertise in the subject area. *See, e.g.*, Del. Code Ann. tit. 29 § 10141(e) (requiring that the "agency action shall be presumed to be valid" and directing courts additionally to "take due account of the experience and specialized competence of the agency"); Mass. Gen. Laws ch. 30A, § 14(7)(g) (requiring that the "court shall give due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary

authority conferred upon it"). Administrative procedure act appeals are a poor substitute for antitrust enforcement[10] and cannot offer the same rigorous and regular review that "active state supervision" would provide.

IV. STATES ARE CAPABLE OF PROVIDING ADEQUATE SUPERVISION OF PROFESSIONAL BOARDS AND CAN RETAIN THE BENEFIT OF THE PARTICIPATION OF PROFESSIONALS ON REGULATORY BOARDS IF THE DECISION IS AFFIRMED.

Members of *amici* nursing associations serve on boards of nursing across the country and endorse the value and necessity of professional expertise on healthcare professional regulatory boards. Healthcare practitioners provide invaluable insight and knowledge on questions relating to quality, safety and the practicality of rules or standards, based on their intimate knowledge of current technology and practice.

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[10] Unlike federal antitrust laws which support the enforcement activities of private plaintiffs by virtue of provisions for attorneys' fees and treble damages, administrative procedure acts offer no support for consumers or competitors to mount expensive and daunting legal challenges to agency actions. *See* 15 U.S.C. § 15. In states where board actions are presumptively valid, individuals challenging a board action also face heightened burdens of proof not required of antitrust plaintiffs.

Amici nursing associations and the CAC disagree with *amici* supporting reversal, however, that "active state supervision" of such boards would undermine their efficacy[11] or that state supervision would otherwise be impracticable. States already recognize the value of including independent members on healthcare professional boards. The large majority of states require one or more consumer, public or other non-professional representative on their boards regulating registered nurses and on their boards of medicine.[12] *See* FSMB *Trends and Actions*, *supra*, at 43; NCSBN *Board Structure*, *supra*, at 9. In order to ensure the independence of these members, most state boards regulating registered nurses prohibit these individuals from involvement or interests in the healthcare industry.[13] *See* NCSBN *Board Structure*, *supra*, at 24-45.

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[11] *Amici* nursing associations and the CAC acknowledge that the state agency providing oversight must not also be controlled by practicing healthcare professionals. Otherwise, the establishment of an oversight agency would merely change the locus of the problem of professional entrenchment. For example, the creation of state umbrella boards controlled by practicing healthcare professionals may even aggravate the problem by consolidating authority in the hands of practicing healthcare professionals.

[12] According to statistics calculated using the data in NCSBN *Board Structure* and FSMB *Trends and Actions* surveys, greater than ninety percent of boards of medicine and greater than seventy percent of boards regulating registered nurses require at least one member designated as a consumer or public representative.

[13] According to statistics calculated using the data in NCSBN *Board Structure* survey, more than seventy percent of boards regulating registered nursing with a consumer or public representative place limitations on the member's healthcare interests in or association with healthcare businesses.

Contrary to claims by *amici* supporting reversal, independent state oversight of boards of nursing is not a novel concept. A number of states provide for oversight of nursing board activities by a state agency. *See, e.g.*, Conn. Gen. Stat. Ann. §§ 20-90, 96, 99a (Department of Public Health adopts regulations and approves nursing programs with advice and assistance from the Board); 225 Ill. Comp. Stat. 65/50-65 (Department of Financial and Professional Regulation adopts and revises rules, approves or denies nursing education programs, and conducts disciplinary actions with the recommendation of the Board); Utah Code Ann. § 58-31b-201 (Division of Occupational and Professional Licensing determines standards for education programs and reviews complaints of unprofessional conduct with recommendation from the Board).

The notion that the states lack relevant expertise in healthcare matters is unfounded. State departments of health and similar agencies, staffed with public health professionals, are amply qualified to consider and review issues regarding healthcare professional licensing and scope and standards of practice. Indeed, experts considering how to enhance the quality of healthcare professional regulation have endorsed the involvement of state health agencies in the regulatory process to diminish the tendency of healthcare professional boards to self-protect. *See* Gaumer, *supra*, at 408 (discussing recommendations of enhancing state agency involvement in professional regulations of boards to improve efficacy); Pew Taskforce Report, *supra*, at 14. Some experts regard state departments of health as particularly suited to improve healthcare regulatory regimes by virtue of their experience, and the expertise

of staff public health professionals, in evaluating empirical evidence of healthcare and healthcare delivery outcomes and assessing broad public healthcare needs. *See* Dower & Finocchio, *supra*, at 423-26 (identifying and recommending public health agencies and public health professionals as competent to review and handle scope of practice issues).

Legislators likewise are capable of providing oversight. The very licensing and healthcare scope of practice acts enforced by the boards are drafted and passed by layperson legislators, with the benefit of testimony and advice of professionals. Many of these statutes address highly technical procedures and the use of devices unfamiliar to the average legislator. Indeed, federalism principles dictate that the legislators, regardless of their expertise or knowledge, effect the will of the sovereign state.

While *amici* nursing associations and the CAC agree that practicing healthcare professionals are necessary to evaluate these issues, layperson legislators, state agency employees and public board members can and should participate in these decisions. Putting aside the competencies of non-healthcare practitioners to participate or oversee board decisions, the function of the "active state supervision" requirement for purposes of the court's review is merely to insure that the action taken comports with the state's intended policy to displace competition. As this Court has recognized:

> The active supervision requirement stems from the recognition that where a private party is engaging in the anticompetitive activity, there is a real

> danger that he is acting to further his own interests, rather than the governmental interests of the State The requirement is designed to ensure that the state-action doctrine will shelter only the particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies.

Ticor Title, 504 U.S. at 634 (internal quotation marks omitted).

The issue under this Court's jurisprudence is not whether the state's decision is effective, sound or advisable, but whether, in fact, the action is the state's decision. *Id.* at 634-35 ("Our decisions make clear that the purpose of the active supervision inquiry is not to determine whether the State has met some normative standard, such as efficiency, in its regulatory practices."). No special or technical expertise is required of the state to determine whether the board action is consistent with the policy to displace competition adopted by the state. *See Hoover*, 466 U.S. at 569 ("The Court did not suggest in *Parker*, nor has it suggested since, that a state action is exempt from antitrust liability only if the sovereign acted wisely after full disclosure from its subordinate officers. The only requirement is that the action be that of the State acting as a sovereign.") (internal quotation marks omitted).

Affirming the Fourth Circuit decision should not force the states to abandon reliance on the knowledge and expertise of practicing professionals subject to state regulation. States should be able, in *amici's* view, to

continue to staff healthcare professional boards with a majority of the regulated professionals while also insuring through "active state supervision" that the decisions of the board accurately reflect the policy of the state.

CONCLUSION

When the sovereign state chooses to delegate its regulatory authority to private economic actors, the doctrine of state action immunity requires a closer examination of the true nature of the state sanctioned entity and closer review by the state. The Fourth Circuit correctly deemed the North Carolina Board of Dental Examiners, privately controlled and elected by market participants, a private actor vested with regulatory authority by the state and requiring that it both act consistent with a "clearly articulated and affirmatively expressed" state policy to displace competition and with the benefit of "active state supervision." Professional regulatory boards controlled by actively practicing professionals are not analogous to municipalities for purposes of state action immunity. These majority practitioner boards lack any electoral check or any meaningful public review of their activities and, unlike municipalities, possess the incentive to protect entrenched private economic positions *vis a vis* potential competitors, harming consumers by their decisions. State supervision of these professional boards is feasible and appropriate. Reversal of the Fourth Circuit decision would doctrinize a loophole in antitrust enforcement, permitting states to surrender legislative power to market participants selected exclusively by other market participants without any assurance that

the board is acting consistent with state policy, merely by designating the board a "state agency."

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 13-534

IN THE

Supreme Court of the United States

THE NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE AMERICAN DENTAL ASSOCIATION, AMERICAN MEDICAL ASSOCIATION, ET AL. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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American College of Surgeons
American Psychiatric Association
American Society of Anesthesiologists
North Carolina Medical Society
The Litigation Center of the American Medical Association and the State Medical Societies

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INTEREST OF THE *AMICI CURIAE*[1]

Amici American Dental Association, American Medical Association,[2] American Osteopathic Association, American Veterinary Medical Association, and the other listed professional societies have as members doctors whose practices are regulated by state boards in all fifty states, the District of Columbia, and U.S. territories. *Amici* American Association of Dental Boards and Federation of State Medical Boards are, respectively, the national associations of such boards in the fields of dentistry and medicine. *Amici* support the determination by state legislatures across this country that the health professions should be regulated by knowledgeable health care professionals who have practical experience in the profession that they are regulating. *Amici* and their members believe that the public is best served when state regulatory boards duly constituted in accordance with state law are free to make decisions on public health issues based on clinical experience without fear of second-guessing under the federal antitrust laws.

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for any party authored this brief in whole or in part, and no person or entity has made any monetary contribution intended to fund the preparation or submission of this brief. Letters from the parties consenting to the filing of *amicus* briefs have been filed with the Clerk's office.

[2] The American Medical Association and North Carolina Medical Society file this brief both on their own behalves and as representatives of the Litigation Center of the American Medical Association and the State Medical Societies.

INTRODUCTION AND SUMMARY OF ARGUMENT

North Carolina has decided—along with every other state in the country—that the best way to regulate dentistry in the public interest is to create a state licensing agency whose members include practicing dentists. Similarly, all 50 states have determined that the practice of medicine should be regulated by licensing boards that include practicing physicians, and each of the 14 states with a separate osteopathic board provides for a board whose members include licensed osteopathic physicians. Moreover, 49 states have specified that veterinary medicine should be regulated by a board that includes practicing veterinarians. This reliance on regulatory boards composed of practicing doctors reflects an approach stretching back over 150 years in this country. *See infra* Part III.C (describing history of medical and dental boards).

The FTC takes the position that decisions of a state board of dentistry—established, constituted, and functioning in accordance with state law—are subject to being overturned under the federal antitrust laws if members of that state agency include practicing dentists. In this case, the FTC has forbidden the North Carolina Board of Dentistry to so much as "discourag[e] the provision of Teeth Whitening Services by a Non-Dentist Provider"—despite a determination by the State legislature that removal of stains from human teeth constitutes the practice of dentistry.[3] Pet. App. 146a. Predicating its decision

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[3] The statute in question does not refer to teeth whitening explicitly, but whitening is fairly characterized as "[r]emoving stains, accretions or deposits from the human teeth." N.C. Gen. Stat. § 90-29(b)(2).

on the structure of the regulatory body that the State legislature has chosen to constitute, the FTC determined that the Board is subject to the FTC's continuing supervision, and the Fourth Circuit affirmed the FTC's Order. The Fourth Circuit's decision should be reversed.

First, as explained in Part I, the decision below is contrary to *Parker v. Brown*, 317 U.S. 341 (1943). In that case, this Court held that the Sherman Act was not intended to apply to sovereign regulators, including regulators that had as members participants in the regulated field. More than seventy years ago, the Court recognized that where a state agency is duly constituted and empowered by the legislature to engage in regulation, any regulatory restraint imposed by that agency is an act of a sovereign government which Congress did not intend the antitrust laws to reach. The decision in that case, and in all subsequent state action cases of this Court, was based on the role of the states in our system of federalism—and not on an analysis of the supposed economic interests of members of the state agency.

Second, as addressed in Part II, the FTC Act's text, purpose, and legislative history confirm that the Act was never intended to subject state regulatory boards to the FTC's oversight. In particular, § 5 of the FTC Act empowers the FTC to prevent "persons, partnerships, or corporations" from engaging in "unfair methods of competition." 15 U.S.C. § 45(a)(1), (2). Yet state agencies are not, and were never intended to be treated as, "persons, partnerships, or corporations" subject to the FTC's jurisdiction.

Third, adoption of the FTC's position, as affirmed in the decision below, would have perverse consequences for patients and the public. These conse-

quences, examined in Part III of this Brief, include the following:

A. Subordinating Public Health to Antitrust Considerations. Affirmance of the Court of Appeals would induce state medical and dental boards faced with difficult policy judgments to subordinate their view of what is in the best interest of the *public health*—in favor of decisions that reflect the FTC's views on federal *competition* policy. Indeed, the threat of antitrust liability may well cause state regulatory authorities to forbear from regulating at all in areas where the need to protect the public from unsound medical practices or unqualified medical practitioners is most critical—lest they and their members be subjected to costly, burdensome, and uncertain antitrust litigation.

B. Discouraging Service on Regulatory Boards. Affirmance could discourage conscientious practitioners from serving on state regulatory boards for fear of burdensome litigation and possible personal liability, including treble damage actions brought by persons claiming that the state regulators violated the federal antitrust laws. *See, e.g.*, Am. Compl., *Petrie v. Va. Bd. of Medicine et al.*, No. 1:13-cv-1486 (E.D. Va. Feb. 3, 2014) (D.I. 13) (seeking treble damages from medical board and the practicing physicians who serve on it).

C. Disrupting a 150-Year Tradition of Regulation by Practicing Professionals. Finally, in order to avoid intrusion by the FTC in health care regulatory matters traditionally the responsibility of the states, state legislatures would be pushed to alter their choices as to the membership and method of selection of members of state regulatory boards in favor of the FTC's preferences on these matters. This result would interfere with a long tradition of regulation of

the medical professions by boards composed of experienced and practicing doctors, which stretches back over 150 years and is based on virtually uniform state legislative judgments that such practitioners are best qualified to promote the public health.

As national and state associations of practitioners who serve on state regulatory boards in health care and as the associations of such boards, *amici* represent to this Court that this case is being closely watched by those who might be called upon to serve their states. If the decision below is permitted to stand, the foreseeable result is that many highly qualified practitioners who would otherwise be willing to serve on boards will either resign or refuse to accept office lest they face significant personal antitrust exposure. More importantly, the decisions of state medical and dental boards will be distorted by considerations of federal competition policy to the detriment of public health. For that reason, this Court should make clear that the actions of duly established state regulatory boards and their members are immune from the federal antitrust laws even if those boards are made up of market participants—as they have been for over 150 years.

ARGUMENT

I. THE BOARD IS A DULY CONSTITUTED STATE AGENCY THAT ACTS ON BEHALF OF THE STATE ITSELF.

A. Under *Parker v. Brown*, Agencies Of The State Cannot "Restrain Trade" Even If They Include Market Participants.

The dispositive issue in this case is whether the Board really is—as the North Carolina legislature explicitly declared it to be—"the agency of the State

for the regulation of the practice of dentistry," N.C. Gen. Stat. § 90-22(b). If so, its actions and regulations are those of the state itself and cannot be conspiracies "in restraint of trade," 15 U.S.C. § 1, or "unfair methods of competition," *id.* § 45(a)(1), within the meaning of the federal antitrust laws. For under *Parker* and its progeny, official state regulation that restrains competition "as an act of government" falls outside the purview of the antitrust laws. *Parker*, 317 U.S. at 352; *see also Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 365 (1991) ("We reiterate that . *any* action that qualifies as state action is *ipso facto* exempt from the operation of the antitrust laws." (quotes and alteration removed)).

On this dispositive question, the case can begin and end with *Parker*. That decision held that California's Agricultural Prorate Advisory Commission was immune from liability under the Sherman Act because the Commission's acts were those of the state: "[I]t is the state, acting through the Commission, which adopts the program and which enforces it with penal sanctions." 317 U.S. at 352. "The state itself exercises its legislative authority in making the regulation and in prescribing the conditions of its application." *Id.* The Prorate Advisory Commission, like the Dental Board here, exercised regulatory authority as a state agency when it issued and enforced rules within its area of regulatory authority.

Notably, a majority of the Commission's members in *Parker* were market participants with a direct financial interest in the proration of agricultural commodities. *See* 1939 Cal. Stat. ch. 894, § 3 ("Six of the [nine] appointive members of said commission shall be engaged at the time of their appointment in the production of agricultural commodities as their principal occupation"). Yet that fact played no role in this

Court's analysis because the composition of a state agency is irrelevant to the principles of federalism that underlie the state action doctrine. Rather, because (1) the Sherman Act does not "restrain a state or its officers or agents from activities directed by its legislature," and (2) the Commission was a state agency regulating pursuant to legislative authorization, the Sherman Act simply did not apply.

A straightforward application of *Parker* and the principles on which it is based controls this case. Notwithstanding the FTC's focus on the manner in which North Carolina has chosen to constitute its Board of Dental Examiners, the Board is an "agency of the State." N.C. Gen. Stat. § 90-22(b).[4] It is vested "with full power and authority to enact rules and regulations governing the practice of dentistry within the State." *Id.* § 90-48.[5] Because the Board *is* the state, its authorized actions are not subject to antitrust scrutiny. *See Hoover v. Ronwin*, 466 U.S. 558, 574 (1984) ("The reason that state action is immune

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[4] The decision below emphasized the fact that the dentists comprising the North Carolina Board are elected by their professional peers rather than being appointed by the Governor. While this fact does provide a distinction between the North Carolina Board and the majority of state professional boards, the distinction should make no difference. The critical fact is that, under each system, members are chosen by a process established by the state legislature. There is no reason to treat the North Carolina Board as warranting any less protection under the state action doctrine.

[5] Virtually every decision to address the issue has held that a state board of medicine or a state board of dentistry is a legitimate state agency. *See, e.g., Bettencourt v. Bd. of Registration in Med.*, 904 F.2d 772, 781 (1st Cir. 1990); *Neuwirth v. La. State Bd. of Dentistry*, 845 F.2d 553, 555 (5th Cir. 1988); *Howard v. Miller*, 870 F. Supp. 340, 343 (N.D. Ga. 1994); *Connolly v. Beckett*, 863 F. Supp. 1379, 1381 (D. Colo. 1994).

from Sherman Act liability is not that the State has chosen to act in an anticompetitive fashion, but that the State itself has chosen to act.").

If the Board were a private party rather than a state agency, the inquiry would be more complex and contextual. *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1010 (2013) ("Following *Parker*, we have held that under certain circumstances, immunity from the federal antitrust laws may extend to nonstate actors carrying out the State's regulatory program."). The reason for this complexity is that, unlike state officers or agencies, private parties do not make state policy. Thus, where private conduct is concerned, there is always a question as to "whether the anticompetitive scheme is the State's own." *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 635 (1992).

As this Court has explained, the existence of legislation merely authorizing private conduct that may have anticompetitive effects is insufficient to confer *Parker* immunity on private parties: "The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106 (1980); *see also Parker* 317 U.S. at 351. A private restraint is treated as state action only when it is clearly articulated as state policy and actively supervised by the state—that is, when the anticompetitive consequences are fairly treated as the affirmative choice of the state itself. *Midcal*, 445 U.S. at 105. But when a duly authorized state agency acts within the scope of its legislative mandate, that action is the action of the state itself—which makes the "active supervision" inquiry beside the point.

The FTC's reliance on *Midcal* in an attempt to impose an active-supervision requirement on a state's own agency is contrary to the Court's analysis in *Midcal* itself. *See id.* at 104. The relevant portion of the opinion concerns the role of "local cooperatives" in "develop[ing] market policies for the raisin crop" at issue in *Parker*. *Id.* The participation of these private cooperatives might have invited antitrust scrutiny, were it not for the supervision by a state Advisory Commission:

> The Court emphasized that the Advisory Commission had to approve cooperative policies following public hearings In view of this *extensive official oversight*, the Court wrote, the Sherman Act did not apply. Without such oversight, the result could have been different.

Id. at 104 (emphasis added). State agencies do not require supervision—they *provide* it. *See also Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46 n.10 (1985) (noting that, where "the actor is a state agency, it is likely that active state supervision would also not be required"). State agencies cannot provide supervision as the state and simultaneously require supervision by the state.

Active supervision is a prerequisite to treating private restraints as state policy, but state agencies make state policy directly. As one legal scholar has observed:

> State agencies may adopt anticompetitive regulatory policies for the state as a whole. Because those actions by definition constitute state policy, they should be entitled to antitrust immunity under the Parker doctrine without any further requirement for clear articulation or active supervision by the state legislature.

Floyd, *Plain Ambiguities in the Clear Articulation Requirement for State Action Immunity*, 41 B.C. L. Rev. 1059, 1112 (2000); *see also* Weber, Comment, *The Antitrust State Action Doctrine and State Licensing Boards*, 79 U. Chi. L. Rev. 737 (2012) (arguing that state boards should not be subject to active-supervision requirement). The Board makes state policy within the zone of its statutory authority without any need for input from, or supervision by, any other state official or agency. Hence, its authorized actions should be immune from antitrust scrutiny.

Further, requiring active state supervision of a dental or medical licensure board is impractical. Any supervising body composed of competent and experienced professionals would be equally subject to the FTC's proposed supervision requirement. Thus the state would have to supervise its supervisors. And any non-professional supervising body would lack the expertise necessary for a meaningful evaluation of the complicated and technical decisions made by the board. *Cf. Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 772 (1999) (noting the "specialized knowledge required to evaluate [professional] services"); *S. Motor Carriers Rate Conference v. United States*, 471 U.S. 48, 64 (1985) ("Agencies are created because they are able to deal with problems unforeseeable to, or outside the competence of, the legislature.").

The principle advocated here is fully consistent with *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), which denied antitrust immunity for the Virginia State Bar's role in setting and enforcing minimum fees for legal services. The Bar in that case was a state agency, but only for the very limited purpose of "investigating and reporting the violation of rules and regulations as are adopted by the [Virginia Supreme] Court to a court of competent jurisdic-

tion." *Id.* at 776 n.2 (quoting Va. Code Ann. § 54-49 (1972)). The Bar's enforcement of minimum fee schedules fell far outside this delegated regulatory authority. Indeed, such enforcement flouted a rule of the Virginia Supreme Court, which expressly barred lawyers from "permit[ting themselves] to be controlled" by a "schedule of minimum fees adopted by a Bar Association." *Id.* at 789 n.18. The "fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield" for activities far beyond the Bar's delegated regulatory authority. *Id.* at 791. Here, by contrast, the Board has acted squarely within the area of the authority conferred on it by the state legislature, *i.e.*, the investigation and prevention of the unauthorized practice of dentistry.

B. The FTC's Approach Would Subordinate Federalism To Competition Policy.

If adopted, the FTC's contrary approach (and the approach of the Court of Appeals below) would tear *Parker* from its conceptual moorings and undermine the principles of federalism that animate the doctrine of state-action immunity.

The FTC seeks to distinguish among state agencies—treating some as the state itself and others as nonstate actors under *Parker*—based on the extent to which an agency's decision-making may arguably be influenced by private financial interests. Pet. App. 14a. The FTC's theory, drawn largely from the academic literature, is that financial interest increases the risk that officials may act contrary to good public policy and, more specifically, contrary to the policies of the antitrust laws. *See, e.g.*, 1A Areeda & Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 224b1 (3d ed. 2009) ("we would reserve the 'state itself' designation only for government agencies that have no partic-

ular susceptibility to capture by a particular business group."); *id.* ¶ 224b2 (worrying that, with representatives from industry serving as officials, "the idea of a neutral government watchdog has largely been given away"); Elhauge, *The Scope of Antitrust Process*, 104 Harv. L. Rev. 667, 690-91 (1991) (justifying distinction between private and public action "based on the economic incentives of the person restraining trade" in light of the observation that "the private party has interests at issue that can be advanced by restraining trade").

The fundamental flaw in this theory is that it subordinates the principles of federalism on which the state action doctrine is based to antitrust considerations—even though *Parker* is based on precisely the opposite balancing, *i.e.*, that antitrust values must give way to the sovereignty of states in our federal system. In addition, the FTC's theory would create significant expense and uncertainty for state regulation of the professions. It would subject state boards and their members to fact-based litigation on whether their decisions were based on private financial interests.

Not surprisingly, therefore, the approach advocated in the academic literature and invoked by the FTC in this case was expressly rejected by this Court in *Omni Outdoor Advertising*. There, the plaintiff argued that there should be a "conspiracy exception" to state action, *i.e.*, that state officials or agencies should not be entitled to immunity where they pursue private interests or act in bad faith. 499 U.S. at 376. And the plaintiff's concerns about the officials' motivations were not unfounded, since the mayor and other members of the city council were "personal friends" of the majority owner of a local monopolist, which "contributed funds and free billboard space to their cam-

paigns." *Id.* at 367. In fact, the plaintiff proved to a jury that the monopolist conspired with city officials "to restrain trade and monopolize the market." *Id.* at 369.

Nevertheless, this Court held that the city was immune, for there is no conspiracy or corruption exception to state action. "The rationale of *Parker* was that . the general language of the Sherman Act should not be interpreted to prohibit anticompetitive actions by the States in their governmental capacities as sovereign regulators." *Id.* at 374. The private interests of the regulators are beside the point: "we reaffirm our rejection of any interpretation of the Sherman Act that would allow plaintiffs to look behind the actions of state sovereigns." *Id.* at 365.

This Court's decision to focus on whether an entity acts in a governmental capacity as sovereign regulator, without looking behind those actions, reflects the "principles of federalism and state sovereignty" on which the antitrust state-action doctrine is based. *Hallie*, 471 U.S. at 38. Indeed, the principle that the actions of an official or agency of the state are those of the sovereign is central to the doctrine of state sovereign immunity under the Eleventh Amendment. *See, e.g., Edelman v. Jordan*, 415 U.S. 651, 663 (1974) (explaining that Eleventh Amendment immunity extends to suits against officials where liability would be paid from public funds). Such sovereign actions are precisely those designed to be exempt from antitrust scrutiny under the doctrine of state-action immunity. As this Court explained in *Parker*, the antitrust statutes give "no hint that [they were] intended to restrain state action or official action directed by a state," and this Court has refused to attribute to Congress an "unexpressed purpose to nullify a state's control over its officers and agents." 317 U.S. at 351.

For years, the FTC has pushed states to "broaden the membership of state licensure boards," based on the FTC's view that boards of practicing professionals are more likely to "engage in conduct that unreasonably increases prices or lowers access to health care." U.S. Dep't of Justice & FTC, *Improving Health Care: A Dose of Competition* 22 (July 2004), *available at* http://www.justice.gov/atr/public/health_care/204694.pdf. But every state—including North Carolina—has adopted a different view of what is in the interest of its citizens. These states have chosen to rely on boards that include practitioners to regulate the health professions. Conditioning state-action immunity on the structure and composition of the state agency in question would force the states to refashion their administrative agencies in the FTC's preferred image.

Indeed, to require active supervision for the Board would be to "turn the State against itself and ultimately to commandeer the entire political machinery of the State." *Alden v. Maine*, 527 U.S. 706, 749 (1999). Nothing in the Sherman Act or the FTC Act requires, or should be construed to require, sovereign states to structure their duly constituted administrative agencies in this way. *Cf. VOPA v. Stewart*, 131 S.Ct. 1632, 1641 (2011) (noting the "limits on the Federal Government's power to affect the internal operations of a State").

The authorized actions of a duly constituted state agency should be immune from second-guessing under the federal antitrust laws, regardless of whether the state agency is organized as the FTC would like it to be.

C. Federal Oversight Of State Agencies Is Particularly Inappropriate Given The States' Traditional Role In The Regulation Of The Health Care Professions.

Federal overturning of state policy choices—at least in the absence of a clear and explicit congressional directive—is particularly inappropriate where, as here, regulation of the health professions is at issue. This Court has long recognized that the state's protection of "the health of its citizens is at the core of its police power." *Sporhase v. Neb. ex rel. Douglas*, 458 U.S. 941, 956 (1982). And where federal law is alleged to control in an area that "the States have traditionally occupied, we start with the assumption that the historic police powers of the States were not to be superseded." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (internal citation and quotation marks omitted); *United States v. Lopez*, 514 U.S. 549, 583 (1995) (Kennedy, J., concurring) (cautioning against "foreclos[ing] the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise").

Regulation of the professions is a traditional area of state concern. *See, e.g., Semler v. Or. Bd. of Dental Exam'rs*, 294 U.S. 608, 611 (1935) ("That the State may regulate the practice of dentistry, prescribing the qualifications that are reasonably necessary, and to that end may require licenses and establish supervision by an administrative board, is not open to dispute."). Indeed, this Court has carefully protected professional regulation by the states against interference from the federal antitrust laws: "we intend no diminution of the authority of the State to regulate its professions. Allowing the instant Sherman Act challenge to the disciplinary rule would have precise-

ly that effect." *Bates v. State Bar of Ariz.*, 433 U.S. 350, 360 n.11 (1977); *see also Hoover*, 466 U.S. at 593 n.18 (1984) (refusing to entertain antitrust challenge in connection with regulation of attorneys: "Few other professions are as close to the core of the State's power to protect the public" (internal quotation marks removed)). Allowing federal agencies to subject state boards responsible for regulating the professions to second-guessing under the antitrust laws would generate the very interference this Court sought to avoid in *Bates*.

II. CONGRESS NEVER INTENDED TO SUBJECT STATE REGULATORY BOARDS TO FTC OVERSIGHT.

Parker immunity is based on an interpretation of the Sherman Act. *See* 317 U.S. at 352 ("The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit."). By contrast, the FTC brought this case under § 5 of the FTC Act. 15 U.S.C. § 45(a)(1). There is no dispute that the principles underlying *Parker* apply equally to cases brought under the FTC Act. If anything, the fact that this case was brought under the FTC Act provides an additional reason to reverse the Fourth Circuit's decision.

The FTC's power under the FTC Act is limited to preventing "persons, partnerships, or corporations" from using "unfair methods of competition." *Id.* § 45(a)(2). This limiting language raises an interpretive question as to whether a state agency is a "person, partnership, or corporation" that Congress intended the FTC to regulate. The answer is no. The text, purpose, and history of the FTC Act reveal that

the statute is targeted at the competitive actions of businesses and other commercial entities—not the regulatory actions of state agencies. State agencies simply are not "persons, partnerships, or corporations" within the meaning of § 5(a)(2) of the FTC Act. *Id.* § 45(a)(2).

The Board certainly is not a "partnership." Nor does it come within the FTC Act's definition of a "corporation," which includes "any company or association, incorporated or unincorporated, which is organized to carry on business for its own profit or that of its members." *Id.* § 44. With its focus on entities organized to carry on business for profit, this definition confirms that the FTC Act is concerned with unfair competitive practices of businesses.

Nor is the Board a "person" within the meaning of § 5 of the FTC Act. Although "person" is sometimes given a capacious construction in other contexts, the word is best read under the Act to refer more narrowly to natural persons, and certainly not to government agencies. *See, e.g., Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 780 (2000) (applying the "longstanding interpretive presumption that 'person' does not include the sovereign"). If "person" were construed to include "corporations and associations" as under the Sherman Act, for example, 15 U.S.C. § 7, the words "partnerships" and "corporations" would be mere surplusage.[6] Construing "per-

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[6] Unlike the FTC Act, neither the Sherman Act nor the Clayton Act uses the limiting phrase "persons, partnerships, or corporations." For this reason, the Fourth Circuit was wrong to rely on this Court's interpretations of "person" under the Sherman Act and Clayton Act when construing the term "person" under the FTC Act. *See* Pet. App. 9a n.2 (citing *Jefferson Cnty. Pharm. Ass'n v. Abbott Labs.*, 460 U.S. 150, 155 (1983); *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 395 (1978)).

sons" as natural persons avoids this outcome and gives operative effect to Congress's decision to list these other kinds of entities. *See Dunn v. Commodity Futures Trading Comm'n*, 519 U.S. 465, 472 (1997) ("[L]egislative enactments should not be construed to render their provisions mere surplusage."). In contrast, reading "partnerships" and "corporations" out of the statute fails to "respect Congress' decision to use different terms to describe different categories of people or things." *Mohamad v. Palestinian Auth.*, 132 S.Ct. 1702, 1708 (2012).

The text of the FTC Act thus confirms what this Court has long recognized with respect to the purposes of the antitrust laws more generally: "[T]he antitrust laws regulate business, not politics." *Omni Outdoor Adver.*, 499 U.S. at 383. Congress passed the FTC Act to curtail unfair methods of competition of for-profit business engaged in a rough-and-tumble marketplace.

This conclusion is reinforced by the history of the FTC Act. At the time of its passage in 1914, there was a widespread belief that existing judicial enforcement of the Sherman Act against industrial and commercial enterprises and combinations thereof had been inadequate. *See* S. Rep. No. 62-1326, at 13 (1913); S. Rep. No. 63-597, at 8-9 (1914); H.R. Rep. No. 63-1142, at 18-20 (1914). Congress expected that the new Trade Commission that it was establishing would develop such unique expertise concerning industrial and commercial entities that it would be better able to apply national antitrust policy to these entities than would a court.[7] Accordingly, the whole

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[7] The legislative history repeatedly emphasized the conviction of Congress that the Trade Commission would be "an administrative body of practical men thoroughly informed in regard to

thrust of the legislative history is that the Act was passed to apply to "industrial business" and, specifically, to manufacturers, dealers and associations, or other combinations thereof.[8] And although state regulatory boards had long been in operation, *see, e.g.*, *Dent v. West Virginia*, 129 U.S. 114 (1889), there was no testimony or discussion related to empowering the FTC to police the activities of such boards.

In short, the language and legislative history of the FTC Act, much like that of the Sherman Act in *Parker*, give "no hint that [the statute] was intended to restrain state action or official action directed by a state." *Parker*, 317 U.S. at 351. To the contrary, the FTC was not authorized by Congress to regulate state agencies that are charged by state legislatures with regulating the health care professions.

III. SUBJECTING STATE REGULATORY BOARDS TO OVERSIGHT BY THE FTC WOULD UNDERMINE THE ABILITY OF STATES TO REGULATE THE HEALTH PROFESSIONS.

The Fourth Circuit affirmed an Order that gives the FTC continuing supervisory authority over the Board for years to come. Pet. App. 150a. If this Court adopts the Fourth Circuit's approach, it will encourage states to change how they regulate health professionals in significant ways. States could not

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business," H.R. Rep. No. 63-1142, at 18-19 (1914), and would have unique expertise concerning "the business and economic conditions of . . . industry." S. Rep. No. 63-597, at 8-9.

[8] *See, e.g.*, 51 Cong. Rec. 8840, 8840 (1914) (Rep. Covington) ("covers industrial business"); *id.* at 8851 (Rep. Stevens) (retailers and manufacturers discussed); *id.* at 8986 (Rep. Montague); *Comty. Blood Bank v. FTC*, 405 F.2d 1011, 1017-18 (8th Cir. 1969) (quoting letter to Sen. Newlands discussing associations of manufacturers and dealers).

safely rely on highly qualified, practicing doctors—practical professionals thoroughly informed in regard to their profession—to regulate within the area of their expertise. The risk of antitrust liability with the threat of treble damages and fee-shifting provisions, or even costly antitrust investigations, would undermine state regulation of the health professions.

A. Requiring State Boards To Adopt The FTC's Position On Competition Would Come At The Expense Of Public Health.

Subjecting state regulatory boards whose members are professionals to antitrust scrutiny would place a chill on state regulatory boards and cause harm to the public interest because there could be no confidence that a board's implementation of the applicable state statute would survive second-guessing by the FTC. It is not the job of the FTC—applying the "gauzy cloak" of the federal antitrust laws—to pass judgment on the procedures and policy decisions of a duly constituted agency of state government. But the risk that the FTC will do so is likely to distort state health policy. And the risk that a decision requiring active supervision may be invoked to justify treble damages actions (with a mandatory award of attorneys fees to a prevailing plaintiff)—and other proceedings against boards or their members—can only further distort regulation.

Suppose, for example, that a state medical board is called upon to determine whether the performance of certain services by a non-physician clinician constitutes the unlicensed practice of medicine. The board may well conclude that, based on its medical judgment, the nature of the procedures and the training of the non-physician clinician are such that permitting him or her to perform these services without adequate physician supervision would pose significant

risks to patients. However, knowing that such a decision could expose both the board and its members to litigation by the FTC or a private plaintiff alleging that the decision suppresses competition by non-physician clinicians against physicians, the board is more likely to adopt a rule that permits such clinicians to perform services that pose a risk to the public. Or the board might be so concerned about the threat of antitrust liability that it refuses to adopt any rule at all.

In such circumstances, state health policy is trumped by federal antitrust policy—directly contrary to the principles of *Parker*. The federal antitrust laws were not enacted, and should not be permitted, to subvert medical and dental decisions by duly constituted state boards regarding what they believe to be in the best interests of patients and the public. In this case, the state legislature has determined that, when it comes to preventing the unauthorized practice of dentistry, the Board should make decisions in a way that puts a premium on avoidance of risk to patients, even at the cost of higher prices. The state's policy choice might be debated, but it should not be set aside in favor of the FTC's preferred policy.

In this connection, it is worth noting that this Court has recognized that even private professional self-regulation can promote competition in a market in which consumers have difficulty monitoring the quality of services available. *See Cal. Dental Ass'n*, 526 U.S. at 772-74. As the Court noted, "the quality of professional services tends to resist either calibration or monitoring by individual patients or clients, partly because of the specialized knowledge required to evaluate the services," and the "existence of such significant challenges to informed decision-making by the customer for professional services immediately

suggests" that certain restrictions on competition likely benefit consumers. *Id.* at 772-73. It is true that, by design, medical and dental licensing boards limit the extent and ways in which individual professionals may compete, but those limits tend to promote rather than inhibit patient decision-making and public health.

At bottom, allowing the FTC to sit in judgment of state regulatory boards reflects a profound mistrust of the democratic process and of judicial review in the state courts. If a state legislature enacts laws that are not in the interest of the public, the cure lies in the electoral process. And if a state board whose members are market participants acts in the interests of their fellow practitioners rather than in the interests of the public, the remedy lies in the state legislature—where either the substance of a regulation or the composition of the board can be changed by majority vote. In addition, a remedy is available in the state courts—where any person aggrieved by final agency action may obtain judicial review. *See* N.C. Gen. Stat. § 150B-43.

Private actors are not subject to electoral or legislative scrutiny, or judicial scrutiny under a state's administrative procedure act; state-created regulatory agencies (including agencies comprised of market participants) are. It is the democratic process and the state courts, not the decisions of federal antitrust enforcers far removed from the realities of the practice of a profession in a state, that should protect the public interest in the regulation of professionals by a state agency.

B. The Risk Of Antitrust Liability Will Discourage Qualified Professionals From Serving On Regulatory Boards.

Exposing regulatory boards to antitrust scrutiny undercuts state regulation of the professions in yet another way. If state regulatory boards are subject to the federal antitrust laws on the theory that their members are private actors, then those members may fear that they will be exposed to personal liability for treble damages.[9] *See* 15 U.S.C. § 15(a) (providing that persons injured by antitrust violations "shall recover threefold the damages" they sustain). They would reasonably be concerned that they will be treated no differently from private conspirators. In the circumstances, conscientious practitioners who might otherwise volunteer to serve on a state regulatory board in areas in which they practice will determine that the risk of burdensome litigation and even liability is too great.

At least one treble-damages suit against physicians who serve on a state medical board has already been filed in the wake of the Court of Appeals decision in this case. *See* Am. Compl., *Petrie v. Va. Bd. of Med, et al.*, No. 1:13-cv-1486 (E.D. Va. Feb. 3, 2014) (D.I. 13). The complaint in *Petrie* alleges that a state medical board and its members, including practicing physicians appointed by the Governor, conspired to restrain trade by agreeing to bar chiropractors from competing in certain service markets. When the defendants moved to dismiss, the plaintiff in *Petrie* ex-

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[9] Although the members of a state regulatory board may be immune from suit for their official actions under the Eleventh Amendment, they might reasonably fear that sovereign immunity will be denied. *See, e.g., Versiglio v. Bd. of Dental Exam'rs of Ala.*, 651 F. 3d 1272 (11th Cir. 2011) (denying immunity).

pressly invoked the decision below and succeeded in avoiding dismissal. *See* Resp. to Mot. to Dismiss at 12 (Mar. 4, 2013) (D.I. 27) ("Petrie presents strong and serious federal antitrust claims with great similarity to claims affirmed by the Fourth Circuit in *North Carolina State Board of Dental Examiners v. Federal Trade Commission*"). In short, the risk that the holding in the decision below will invite expensive antitrust litigation threatening treble damages against individual board members is not hypothetical. Such litigation has already been brought, and it has survived dismissal based at least in part on the decision under review.

This Court has previously recognized the chilling effect of antitrust scrutiny on the willingness of professionals to participate on state regulatory boards:

> It is customary for lawyers of recognized standing and integrity to serve on these bodies, usually as a public duty and with little or no compensation. There can be no question that the threat of being sued for damages—particularly where the issue turns on subjective intent or motive—will deter "able citizens" from performing this essential public service.

Hoover, 466 U.S. at 580-81 n.34. This observation applies to physicians, dentists, and other professionals just as it does to the attorneys in *Hoover*.

The same considerations that underlie the doctrine of official immunity apply equally here. That doctrine is based on the proposition that the public is best served when government officials are not subject to personal liability for action taken in good faith. *See, e.g.*, *Butz v. Economou*, 438 U.S. 478, 506 (1978) (emphasizing "the need to protect officials who are required to exercise their discretion and the related

public interest in encouraging the vigorous exercise of official authority"). Otherwise, as noted above, the officials will be constrained from making the hard decisions lest they be exposed to personal damages actions. Yet exposure to the threat of treble damages actions is precisely what members of state boards will face if the decision below is affirmed.

C. Federal Antitrust Oversight Would Disrupt A 150-Year Tradition Of State Regulation By Boards Of Practicing Doctors.

States have relied on boards whose members are practicing professionals from the birth of modern regulation of the health professions. These boards have long been treated as agencies of the state, created for the protection of the public.

Although licensure goes back to the colonies, the modern system can be traced to the mid- to late-nineteenth century. *See* Johnson & Chaudhry, *Medical Licensing and Discipline in America* 23 (2012). In 1859, North Carolina became one of the very first states to create a board of medical examiners, which consisted entirely of "regularly graduated physicians" and was empowered "to examine all applicants for license to practice medicine or surgery." N.C. Stat. ch. 258, §§ 3-5 (1859). Other states followed suit, typically creating medical boards composed solely of professionals. *See, e.g.*, Colo. Stat. ch. 101, § 3547 (1881) (establishing a board of medical examiners, "to be composed of nine practising physicians, of known ability and integrity"); Va. Stat. ch. 77, § 1745 (1886) ("[B]oard shall consist of men learned in medicine and surgery"); *cf.* Penn. Pub. L. 79, May 16, 1895, § 1 (establishing State Board of Veterinary Medical Ex-

aminers, "to consist of five members, who shall be of good standing in the veterinary profession").[10]

Around the same time, states began to create state licensing boards for dentistry. These boards, too, were typically composed entirely of practicing professionals. For example, North Carolina's first board of dental examiners, established in 1879, consisted of "six members of the North Carolina Dental Society, to be elected by the said society." N.C. Stat. ch. 139, § 2 (1879); *see also, e.g.*, Ill. Stat. ch. 91, § 36 (1881) ("A board of examiners, to consist of five practicing dentists, is hereby created"); Ok. Stat. ch. 28, § 2669 (1890) (creating board "consist[ing] of five practicing dentists who shall have been engaged in the continuous practice of dentistry or dental surgery for at least two years prior to the passage of this act"); 48 Wash. Stat. § 2855 (1888) ("A board of dental examiners, consisting of five practicing dentists, is hereby created"); Wis. Stat. ch. 56c, § 1410e (1897) (creating board "consist[ing] of five practicing dentists, at least three of whom shall be members of the Wisconsin state dental society"). In many states, as in North Carolina, board members were selected by other practicing dentists. *See, e.g.*, Ala. Stat. ch. 3, § 1310-11 (constituting dental board, to be "elected by the Alabama Dental Association"); 8 S.C. Stat. ch. 24, § 985 (1875) ("The South Carolina State Dental Association shall elect a Board of Examiners, to consist of

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[10] *See also* Johnson & Chaudhry, *supra*, at 23 ("Texas adopted its medical licensing authority and created county boards of medical examiners in 1873 (its state board of examiners . . was created in 1907), Nevada in 1875 (its board of medical examiners was created in 1899), Alabama and California in 1876, Illinois in 1877, Minnesota in 1883, Colorado and Washington in 1881, New Mexico in 1882, Virginia in 1884 and Oklahoma in 1890.").

five members, to be known by the title of the Board of Dental Examiners in the State of South Carolina").

Courts appreciated the value and legitimacy of such boards from early on as well, even where their membership included medical professionals appointed by other medical professionals. For example, in *Ex parte Gerino*, 77 P. 166 (Cal. 1904), the Supreme Court of California rejected a constitutional challenge to the power of a board of medical examiners whose members were appointed by the state's medical societies, explaining as follows:

> The board of examiners, when constituted, is not the agent of the medical societies which appoint its members, and its functions are not conferred or designed for the benefit of those societies, or either of them. The board constitutes a state agency for the regulation of the practice of medicine and surgery, and it must discharge that duty under oath and impartially for the benefit of the people

Id. at 167; *see also Wilson v. Thompson*, 83 N.J.L. 57 (N.J. 1912) (noting that the New Jersey Dental Society has the power to appoint members of "the State Dentistry Board, which has entire control, as agent of the state, of the practice of dentistry in the state").

This Court expressed similar approval for the nascent field of modern professional regulation in *Dent v. West Virginia*, 129 U.S. 114 (1889). *Dent* concerned a constitutional challenge to a conviction for practicing medicine without an appropriate certificate from the state board of health, which was composed entirely of experienced, practicing physicians. *See State v. Dent*, 25 W Va. 1 (1884) (providing factual background on conviction); W. Va. Stat. ch. 90, § 1 (1882) ("There shall be a state board of health in this state consist-

ing of two physicians residing in each congressional district thereof, who shall be graduates of reputable medical colleges, and who shall have practiced medicine for not less than twelve years continuously."). This Court rejected the challenge, recognizing the value of requiring that anyone who seeks to offer medical services possess "learning and skill" and "present evidence of it by a certificate or license from a body designated by the State as competent to judge of his qualifications." 129 U.S. at 123.

The FTC's proposed rule would disrupt a tradition in this country—stretching back over 150 years—of state reliance on practitioners "competent to judge" the qualifications of medical professionals. *Id.* In its place, the FTC would erect a regime of review by non-practitioners without knowledge of "the human body in all its complicated parts, and their relation to each other, as well as their influence on the mind." *Id.* at 122.[11] Neither the FTC nor private antitrust plain-

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[11] Even if the decision of the State Board of Dentistry in this case is regarded as restricting competitive entry, regulation by a duly constituted licensure board that includes practitioners promotes competition and consumer welfare by encouraging regulated individuals to meet certain standards and by providing information to consumers of their services. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) ("Congress designed the Sherman Act as a consumer welfare prescription." (internal quotation marks removed)). As noted in *Consolidated Metal Products, Inc. v. American Petroleum Institute*, 846 F.2d 284, 297 (5th Cir. 1988) (Wisdom, J.), a system is not anticompetitive even though one decision coming out of that system might be seen as potentially suppressing competition. *Id.* ("An individual business decision that is negligent or based on insufficient facts or illogical conclusions is not a sound basis for antitrust liability."). Moreover, regulatory boards are designed to promote public health in ways that sometimes limit competition, such as refusing to license unqualified applicants or excluding unlicensed practitioners.

tiffs are well-situated to determine what constitutes the practice of medicine or dentistry, much less how to best regulate the practice of medicine or dentistry to protect the health and well-being of patients.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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May 30, 2014

AMICUS CURIAE BRIEF

No. 13-534

IN THE

Supreme Court of the United States

NORTH CAROLINA STATE
BOARD OF DENTAL EXAMINERS,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF OUT OF TIME AND BRIEF *AMICI CURIAE* OF AMERICAN OPTOMETRIC ASSOCIATION, *ET AL.*, IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE OUT OF TIME *AMICI CURIAE* BRIEF

IN SUPPORT OF PETITIONER

The American Optometric Association (hereinafter "AOA"), Illinois Optometric Association, New Mexico Optometric Association, Michigan Optometric Association, The New Jersey Society of Optometric Physicians, Optometry Association of Louisiana, Alabama Optometric Association, Missouri Optometric Association, Montana Optometric Association, Kansas Optometric Association, Nebraska Optometric Association, South Carolina Optometric Physicians Association, Colorado Optometric Association, Minnesota Optometric Association, Iowa Optometric Association, Indiana Optometric Association, Oklahoma Association of Optometric Physicians, Ohio Optometric Association, Oregon Optometric Physicians Association, Connecticut Association of Optometrists, North Carolina State Optometric Society, Pennsylvania Optometric Association, Mississippi Optometric Association, Texas Optometric Association, Wisconsin Optometric Association, Rhode Island Optometric Association, Virginia Optometric Association, West Virginia Association of Optometric Physicians, Tennessee Association of Optometric Physicians, Florida Optometric Association, Optometric Physicians of Washington, Arkansas Optometric Association, Kentucky Optometric Association, Delaware Optometric Association, North Dakota Optometric Association, Arizona Optometric Association, Georgia Optometric Association, Utah Optometric Association, Hawaii Optometric Association, Nevada Optometric Association, Alaska Optometric Association, Idaho Optometric

Physicians, Wyoming Optometric Association, New York State Optometric Association, Massachusetts Society of Optometrists, Maine Optometric Association, New Hampshire Optometric Association, Vermont Optometric Association, Maryland Optometric Association and South Dakota Optometric Society respectfully move this Court for leave to file the attached amici curiae brief in support of the Petitioner.

Under Supreme Court Rule 37.3(a) the deadline to file amicus briefs in support of the Petitions was May 30, 2014. Letters from counsel for the parties consenting to the filing of amicus briefs have been filed with Clerk of this Court pursuant to Rule 37.3(a). In addition, notice of this out of time amici brief has been provided to counsel for Petitioner and Respondent. While Petitioner takes no position on the Motion, Respondent opposes the Motion.

Amici regret missing the deadline for filing. This is one of the most important cases involving state regulation and licensing of professionals and reaches a contrary result from a case involving the Amicus AOA in the United States Court of Appeals for the District of Columbia which has provided guidance for over thirty years. During that time, licensed Doctors of Optometry have served the public on optometric licensing boards and have established the highest standards of professional practice to improve and ensure the quality of services provided by Doctors of Optometry. Amici, accordingly, have serious concerns that this vital public protection function will be jeopardized by the lower court's ruling.

Accordingly, Amici respectfully request leave to file out of time the accompanying brief in support of the Petitioner.

Respectfully submitted,

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INTEREST OF THE *AMICI CURIAE* IN THE INSTANT MATTER[1]

Amicus American Optometric Association (hereinafter "AOA") represents doctors of optometry, optometry students and paroptometric assistants and technicians. Doctors of optometry provide two-thirds of all primary eye care in the United States. They are regulated by state boards in each of the fifty states which govern the rules of licensure and professional conduct of doctors of optometry. The listed *Amici* state optometric associations have as members doctors of optometry whose practices are regulated by state boards and thereby impacted by this case.

AOA was party to a case that reached a contrary result to the decision of the Fourth Circuit Court of Appeals in the instant case. In the case of *California State Board of Optometry v. Federal Trade Commission*, 910 F.2d 976 (D.C. Cir. 1990), the United States Court of Appeals for the District of Columbia reviewed the Federal Trade Commission's Ophthalmic Practice Rules which declared "that certain state-imposed restrictions on the practice of optometry are unfair acts or practices" and found that the

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1. *Amici* affirm that no counsel for any party authored this brief in whole or in part, and no person or entity, other than the *Amici* or their attorneys, has made any monetary contribution intended to fund the preparation or submission of this brief. The parties to this action have given blanket consents to the filing of amicus briefs, which consents are filed with the Clerk of Court, although, as set forth in this Motion, Respondent opposes this Motion. A complete list of the *Amici* is set forth in the Appendix to this brief.

Federal Trade Commission ("FTC") had no jurisdiction over such state action under *Parker v. Brown*, 317 U.S. 341 (1943) and its progeny. *Id.* at 979, 982. That Court further denied the FTC's petition for rehearing seeking to bring its Practice Rules under the scope of *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), the same standard urged upon the Fourth Circuit Court of Appeals in the instant case. *California State Board of Optometry v. Federal Trade Commission*, 924 F.2d 243, 244 (D.C. Cir. 1991).

For over 30 years, state regulations promulgated by state boards of optometry have not been subject to antitrust laws and doctors of optometry who serve on those state boards have not been subject to antitrust liability. If left to stand, the decision of the Fourth Circuit Court of Appeals could drastically change that landscape and impair the ability of qualified professionals who are critical to the regulation of public health, from serving on state regulatory boards.

SUMMARY OF ARGUMENT

The Court of Appeals should be reversed because the State Dental Board is a state actor entitled to claim the protection of the state action exemption from the antitrust laws under *Parker v. Brown*. The composition of the State Dental Board, as the composition of the Commission at issue in *Parker v. Brown*, may be composed of members of the regulated industry without impairing the antitrust immunity. The State Dental Board is not a private actor, but a state actor charged with the policy regulating the practice of dentistry, with no needed oversight.

Doctors are the best qualified and necessary individuals to establish the minimum standards to protect the public health and welfare. Subjecting these professionals and the duly appointed state licensing agencies to antitrust scrutiny will chill the necessary and required participation of doctors and impair the public health.

The Court of Appeals should be reversed.

ARGUMENT

I. *PARKER V. BROWN* AND ITS PROGENY PROTECTS STATE AGENCY REGULATION AND LICENSURE FROM FEDERAL ANTITRUST EXPOSURE.

This Court has consistently held that state action is immune from the federal antitrust laws. *Parker v. Brown*, 317 U.S. 341 (1943). This is a recognition of Congress' respect for state sovereignty and a state's ability to enact regulations free from federal antitrust restraint. *Id.* at 359-360. A state acts through its legislative process, its courts, and its agencies created by law and subject to legislative repeal or modification. Its actions and regulations cannot be conspiracies in restraint of trade or unfair methods of competition.

In the instant case, the Fourth Circuit Court of Appeals found that the North Carolina State Board of Dental Examiners ("State Dental Board") "is a state agency" pursuant to N.C. Gen.Stat. §90-48. 717 F.3d at 364. It further found that the State Dental Board was created and subject to the legislative strictures of the Dental Practice Act. *Id.* Despite these findings, the Court

determined that the State Dental Board was a *private actor*, which could only enjoy the state action exemption to the antitrust laws if it acted pursuant to a "clearly articulated and affirmatively expressed" state policy, *and* was "actively supervised" by the State itself as set forth in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980). The result is that a properly constituted state agency operating within the dictates of its legislative enactments is now subject to federal antitrust exposure and FTC oversight.

This is an incursion into this Court's pronouncement in *Parker v. Brown* that there is "nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." 317 U.S at 350-351. This language does not recognize a distinction between the conduct of a state from the conduct of its officers or agents through which it acts.

To permit the FTC to determine that a state agency, despite being duly constituted by the sovereign state, is *not* a state agency based upon the membership of the agency is an unwarranted invasion into the sovereignty of the state. The very nature of sovereignty permits a state to determine how best to govern, which includes how it selects those who carry out its governance mandate. Permitting a federal review of a state's choices of governance and determining that some state agencies are exempt from antitrust scrutiny and other state agencies are subject to some sort of implied antitrust scrutiny effectively supplants state sovereignty.

Moreover, surely the FTC could not deem a state legislature as a "private actor" when enacting health legislation merely because of an overwhelming number of doctors in the legislature, thus subjecting the state legislature to antitrust exposure. That would eliminate the entire concept of the state action exemption. Why then is the composition of a duly constituted state agency not similarly protected by the exemption? It is.

Indeed in *Parker v. Brown*, the state agency at issue was composed of members of the regulated community. The composition of that state agency did not affect its immunity from the antitrust laws. Nor should the membership on the State Dental Board affect that state agency's immunity from the antitrust laws.

The error by the Court of Appeals in determining that the State Dental Board, albeit a properly constituted state agency, is a private actor for purposes of antitrust state exemption analysis is further revealed by the test adopted by that Court. The Court of Appeals found the State Dental Board was subject to the test of showing that it was "actively supervised" by the state as set forth in *Midcal* in order to claim the state action exemption. 445 U.S. at 105. As the state policy making agency, the State Dental Board thus finds itself in the position of supervising itself. The State Dental Board is the state actor.

The practical consequences are enormous. Every health care licensing board is created to establish the policy for the regulated community within the confines of its legislative mandate. There is no oversight, no "super" health care licensing board to oversee the health care licensing board. (And even if one were to be created, how

would that entity claim the state action immunity?) To the contrary, a review of the underlying facts in *Midcal* disclose the faulty analysis.

Midcal involved private local cooperatives, which in and of themselves were not state actors. However, this Court afforded those private entities the state action exemption based upon the "extensive oversight" of the State Advisory Commission, the same Commission which was exempt from the antitrust laws in *Parker v. Brown*. 445 U.S. at 104. The State Advisory Commission in *Parker* served in the same role as that of the State Dental Board in this case. The State Dental Board *is* the state agency charged with the oversight of the state policy governing dentists.

As a properly constituted state agency, the State Dental Board is entitled to claim the state action exemption regardless of its membership and without further "active supervision."

II. HEALTH CARE PROFESSIONALS ARE BEST QUALIFIED TO PARTICIPATE IN THE STATE REGULATION AND LICENSURE OF PUBLIC HEALTH CARE PROFESSIONALS.

Every state relies upon its health care professionals to regulate health care professionals for the public good. Like the regulation of dentistry, doctors of optometry are regulated in each of the fifty states by state agencies established by each state legislature. Each state *requires* the participation of doctors of optometry on each state board. This is recognition that practicing doctors are the best qualified and most experienced individuals to understand the clinical, ethical, scientific and standard

of care aspects of the profession being regulated. It is testament to the states' overwhelming determination that the public is best served by having knowledgeable doctors establishing the standards and best practices which govern and regulate the profession.

Subjecting duly constituted state licensing agencies to antitrust liability will deter necessary and qualified professionals to the detriment of public health. If the decision of the Court of Appeals is affirmed, state licensing agencies risk being second guessed by the FTC who may determine that the state agency is a "private actor" and not able to claim antitrust immunity. The threat of antitrust liability or even the specter of costly investigations will deter many qualified doctors from necessary service.

Indeed, licensing and regulation of doctors is designed to set standards and deter those who cannot meet such standards from endangering the public. This laudable result can easily be derailed by allowing disgruntled practitioners to assert a claim that the licensing regulations unfairly restrain trade. In essence, every unauthorized practice rule is a restraint of trade at some level. Yet every state undertakes to regulate health care professionals for the protection of the public good. Every state has determined that it is necessary and proper to regulate doctors and health care professionals. The antitrust laws should not be permitted to replace decades of sensible state regulation of health and health practitioners.

CONCLUSION

The decision of the Court of Appeals has dangerous implications for the licensing of health care professionals and the public health, safety and welfare. For the foregoing reasons, the Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX — LIST OF *AMICI CURIAE*

American Optometric Association, Illinois Optometric Association, New Mexico Optometric Association, Michigan Optometric Association, The New Jersey Society of Optometric Physicians, Optometry Association of Louisiana, Alabama Optometric Association, Missouri Optometric Association, Montana Optometric Association, Kansas Optometric Association, Nebraska Optometric Association, South Carolina Optometric Physicians Association, Colorado Optometric Association, Minnesota Optometric Association, Iowa Optometric Association, Indiana Optometric Association, Oklahoma Association of Optometric Physicians, Ohio Optometric Association, Oregon Optometric Physicians Association, Connecticut Association of Optometrists, North Carolina State Optometric Society, Pennsylvania Optometric Association, Mississippi Optometric Association, Texas Optometric Association, Wisconsin Optometric Association, Rhode Island Optometric Association, Virginia Optometric Association, West Virginia Association of Optometric Physicians, Tennessee Association of Optometric Physicians, Florida Optometric Association, Optometric Physicians of Washington, Arkansas Optometric Association, Kentucky Optometric Association, Delaware Optometric Association, North Dakota Optometric Association, Arizona Optometric Association, Georgia Optometric Association, Utah Optometric Association, Hawaii Optometric Association, Nevada Optometric Association, Alaska Optometric Association, Idaho Optometric Physicians, Wyoming Optometric Association, New York State Optometric Association, Massachusetts Society of Optometrists, Maine Optometric Association, New Hampshire Optometric Association, Vermont Optometric Association, Maryland Optometric Association and South Dakota Optometric Society

AMICUS CURIAE BRIEF

No. 13-534

In the Supreme Court of the United States

NORTH CAROLINA STATE BOARD
OF DENTAL EXAMINERS,
Petitioner.

v.

FEDERAL TRADE COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF ANTITRUST SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICI CURIAE*

Amici are more than 50 scholars who teach and write about antitrust law and economics at leading universities throughout the country. While having a diverse range of antitrust views, they all share the position taken in this brief. A complete list of signatories is attached as Appendix A. We are interested in the sound development of antitrust law.[1]

SUMMARY OF ARGUMENT

Petitioner advocates a radical change in this Court's precedent on antitrust state action immunity, which has consistently held that financially-interested market participants must be treated as private actors, regardless of whether the state makes them a state agency. Under Petitioner's logic, a state instead can, by the simple expedient of calling market actors a state agency and giving them authority to enforce their cartel, immunize that private cartel and effectively repeal the operation of federal antitrust law. This sort of inverse preemption of federal antitrust law by states has never been permitted by this Court. Petitioner mischaracterizes the cases it claims support its position, which in fact have never given state action immunity to financially-interested market participants unless they are actively supervised by disinterested government actors, and ignores or mischaracterizes other cases that plainly hold the contrary.

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[1] *Amici* have no financial interest in the outcome of this matter. No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amici curiae*, has made a monetary contribution to the preparation or submission of this brief. All parties have consented in writing to the filing of this brief.

In recent decades, the states have created a host of new licensing boards made up of market participants with strong incentives to restrain trade. *See* Aaron Edlin & Rebecca Haw, *Cartels By Another Name: Should Licensed Occupations Face Antitrust Scrutiny?* 162 U. PENN. L. REV. 1093 (2014). Occupational licensing, once limited to a few licensed professions, is widespread and growing — from 5% of the U.S. workforce in the 1950s, to 15% in the 1970s, to 30% today. Occupational licensing has been abused by incumbent market participants to exclude rivals, often in unreasonable ways, and to raise prices. This disturbing trend already costs consumers billions of dollars every year and impedes job growth, and the trend would get much worse if the Court were to accept Petitioner's argument and hold that financially-interested market participants enjoy antitrust immunity whenever the state empowers them as a state agency.

Even if the North Carolina board members were not themselves financially-interested market participants, the fact that they were all elected to their positions by financially-interested market participants should suffice to treat the board as private. After all, if a private cartel paid an employee a flat salary to fix prices for it, the fixed prices would predictably reflect the cartel's financial interests even though the employee was not a market participant and had no direct financial interest in the prices set. Thus, election by financially-interested market participants should always be treated as sufficient to treat a board as private, although such election is not necessary for such treatment when (as here) the board members are themselves financially-interested market participants.

Sufficiency should not, however be confused with necessity. Because state boards dominated by financially-interested market participants are almost always appointed, if the Court changed current law to make election by market participants necessary to lose immunity, it would leave the foxes to guard the henhouse for a large fraction of the workforce.

ARGUMENT

I. FINANCIALLY-INTERESTED MARKET PARTICIPANTS ARE PRIVATE REGARDLESS OF WHETHER THEY ARE STATE AGENTS

We agree with Petitioner that private actors require both clear authorization and active supervision for antitrust state action immunity, whereas "public" agencies of the state require only clear authorization. Pet'r Brief at 3.[2] What Petitioner misses is that whether an actor is private or public for purposes of antitrust state-action immunity is determined by federal antitrust law, not state law. Federal antitrust law deems financially-interested market participants to be private regardless of whether the state treats

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[2] However, Petitioner misleadingly omits that the reason Areeda and Hovenkamp refer to "government's 'public' agencies" and "'public' departments and agencies of the state" with "public" in quotes and modifying "state" and "government," is to make clear that not all state agencies are public for antitrust purposes, stressing that antitrust law only dispenses with the supervision requirement if the agency is "sufficiently 'public'" and that an actor should be deemed "private" if a decisive coalition is made up of market participants. See Phillip Areeda & Herbert Hovenkamp, 1A *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 226b, at 181-83, ¶ 227b, at 226 (4th ed. 2013).

them as a state agency.[3] Were it otherwise, the doctrine would conflict with what Petitioner concedes is the law: that a "state does not give immunity to those who violate the Sherman Act by authorizing them to violate it." *Parker v. Brown*, 317 U.S. 341, 351 (1943); Pet'r Brief at 19-20, 25.

Suppose, for example, that California decided it wanted to allow Hollywood movie producers to fix prices or to exclude TV movie producers contrary to federal antitrust law. Under Petitioner's approach, California could do so by simply appointing their CEOs to a state agency that sets movie prices or that decides who can make movies and giving it the sorts of enforcement authority, duties, and oversight that North Carolina gave its dental board. This is because Petitioner makes state agency status turn on whether the actor was (1) made a state agency, (2) given enforcement powers, and (3) required to submit annual reports and be subject to legislative oversight and judicial review. Pet'r Brief at 6-7, 37-38. All three factors would be equally met in this hypothetical.

All three factors also lack substantive relevance. The first factor, that this movie cartel would be labeled a "state agency," would change nothing substantively because a state could always apply that label to private

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[3] The term "financially-interested market participants" includes competitors, like the dentists here, who regulate competition in their own market. "Market participants" is a broad enough term to also include buyers. The modifier "financially-interested" is added because everyone participates in some market and to the extent that market participants regulate another market or pass regulations in which they have no financial interest, the concerns in this brief do not arise.

businesses if it wanted to authorize antitrust violations. The second factor, that this cartel would have enforcement powers beyond the property rights possessed by ordinary businesses, would make the cartel an even *greater* threat to competition: allowing it to enforce cartel prices or denying licenses to those who might compete with the cartel.

Petitioner's third factor is most telling. If that sort of after-the-fact "oversight" amounted to active state supervision under Supreme Court precedent, then the dental board would get immunity even if it were deemed private. But the whole question presented in this case is whether the board is private enough to require active supervision because the lower court finding that active supervision has not been shown is not here challenged. Perhaps Petitioner is trying to create a lesser novel standard of "oversight" that allows financially-interested market participants to be treated as public in order to avoid the active supervision requirement. Unfortunately for Petitioner, the Court has made clear that "[t]he national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106 (1980).

A. This Court's Precedents Hold that Actors Are Private Whenever They Are Market Participants Who Are Financially Interested in the Restraints at Issue

This Court's antitrust precedents embrace the proposition that financially-interested market participants must always be treated as private actors for purposes of state-action immunity, regardless of whether the state makes them an agency. This was made clear in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), which held that even though the State Bar was made a state agency by state statute and given governmental powers, it must be treated as a private actor for purposes of antitrust state action immunity. *Id.* at 776 & n.2, 789-90. Petitioner argues *Goldfarb* denied immunity to the State Bar because it lacked clear authorization, not active supervision. Pet'r Brief at 49-50. But *Goldfarb* could not have had that distinction in mind since it came before *Midcal* created the distinction between clear authorization and active supervision. Indeed, *Goldfarb* held that state action immunity applied only if the Virginia Supreme Court *compelled* the State Bar's actions, 421 U.S. at 790-91, which goes *beyond* what the modern active supervision prong now requires. In any event, the relevant point about *Goldfarb* is that it concluded the State Bar was, despite being a state agency, joining in "essentially a *private* anticompetitive activity" because it was fostering "anticompetitive practices for *the benefit of its members*." 421 U.S. at 791-92 (emphasis added). *Goldfarb* thus supports the proposition that financially-interested market participants are necessarily private as a matter of federal antitrust law.

Petitioner also ignores many other precedents that support the same proposition. In support of its state action analysis, *Goldfarb*, 421 U.S. at 790, cited *Continental Ore Co. v. Union Carbide*, 370 U.S. 690, 706-707 (1962). On those pages, *Continental Ore* considered whether *Parker v. Brown*'s state action immunity applied to agency actions taken by a business corporation that Canada state officials had appointed to be an official government agent. *Id.* at 695, 702 n.11. The Court denied immunity because the agent's use of its government power to exclude its business rivals had not been approved by "any other official within the structure of the Canadian Government." *Id.* at 707. The Court thus did not treat this financially-interested market participant as a government agent despite its official title and governmental powers, but rather characterized its acts as "private commercial activity." *Id.* Petitioner simply ignores *Continental Ore*.

Petitioner also ignores *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988), which cited *Goldfarb* and *Continental Ore* for the proposition that a certain Association should not be treated as a government actor because "the decisionmaking body of the Association is composed, at least in part, of persons with economic incentives to restrain trade." *Id.* at 501.[4] *Allied Tube* thus confirms that this Court understands

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[4] *Allied Tube* also noted that "no official authority has been conferred on [the Association] by any government," 486 U.S. at 501, but given that official authority *was* conferred by a government in *Goldfarb* and *Continental Ore*, that could not have been the proposition for which *Allied Tube* was citing those two cases.

Goldfarb and *Continental Ore* to have denied state action immunity to state agencies based on their financial interest in restraining trade.

Likewise, *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985), explained that "*Goldfarb* concerned *private* parties—not municipalities—claiming the state action exemption.... We may presume, absent a showing to the contrary, that the municipality acts in the public interest. A *private* party, on the other hand, may be presumed to be acting primarily *on his or its own behalf*." *Id.* at 45 (emphasis added). This again confirms that the Court understands *Goldfarb* to hold that, despite being an official state agency with enforcement authority, the State Bar was private for antitrust purposes. It also confirms that the defining characteristic of a private party is that it has self-interests that create the presumption it acts on "its own behalf." *Hallie* again equated self-interested action with private action by holding that active supervision of a municipality was unnecessary because it was not a "private party," for whom "there is a real danger that he is acting to further *his own interests*, rather than the governmental interests of the State." *Id.* at 47 (emphasis added).

To be sure, *Hallie* also said that, "In cases in which the actor is a state agency, it is likely that active state supervision would also not be required..." *Id.* at 46 n.10. But this sentence did not imply *Hallie* meant to overrule all the prior precedents holding that whether an actor was a state agency for antitrust purposes turned not on formal labels, agency status, or otherwise on state law, but rather on whether it was a financially-interested market participant. To the

contrary, *Hallie* stated immediately after that sentence that: "Where state or municipal regulation by a private party is involved, however, active state supervision must be shown..." *Id.* Thus, *Hallie* expressly acknowledged that "state or municipal regulation" *could* constitute conduct by a "private party," which directly contradicts Petitioner's claim that official state regulation cannot be private action. Further, *Hallie* had just reaffirmed both that the state agency in *Goldfarb* was a private actor and that private actors needed active supervision. *Id.* at 45-46. Moreover, *Hallie* also expressly rejected Petitioner's formalistic approach to what constitutes a state agency, stating: "The determination that a[n actor's] activities constitute state action is not a purely formalistic inquiry." *Id.* at 39.

Other state action immunity precedents likewise equate financial interest with being private. *Patrick v. Burget*, 486 U.S. 94 (1988), held that highly active supervision was necessary because otherwise "there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's *individual interests*." *Id.* at 101 (emphasis added). Just last year, *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003 (2013), stated that "unlike *private* parties, [local governmental] entities are not subject to the 'active state supervision requirement' because they have less of an *incentive to pursue their own self-interest* under the guise of implementing state policies." *Id.* at 1011 (emphasis

added).[5] The language of these cases clearly equates self-interested action with private action.

Treating conduct by a state agent that is a market participant as private would also be consistent with federal statutes that deny sovereign immunity to foreign states when they engage in "commercial activity." 28 U.S.C. § 1605(a)(2).

Thus, this Court's precedents have consistently held that, regardless of state labels and treatment under state law, financially-interested market participants are private actors subject to federal antitrust review. *See* Einer Elhauge, *The Scope of Antitrust Process*, 104 HARV. L. REV. 667, 682-729 (1991) (showing that these and many other cases are consistent with this proposition and that it is also supported by legislative history and federal antitrust policy). Accordingly, when a nominal state agency has a "decisive coalition" consisting of financially-interested market participants, it is a private actor that requires active supervision to enjoy state action immunity. Areeda & Hovenkamp, *supra*, ¶ 227b, at 226.

Here, it is clear that financially-interested market participants were a decisive coalition of the North Carolina Dental Board that imposed the challenged restraints of trade. By statute, not only are six of the eight board members practicing dentists, but those six dentists are the only members allowed to vote on the

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[5] Although the substate governmental entity in *Phoebe Putney* was a market participant, the Court pointedly stressed that the parties had not raised the issue of whether that meant it should be treated as private rather than a state agency for purposes of antitrust state action immunity. 133 S.Ct. at 1100-1101 nn.4-5.

"issuance, renewal or revocation of the license to practice dentistry." N.C. Gen. Stat. § 90–22(b). Moreover, the two non-dental board members "did not participate in teeth whitening investigations" even though they could have.[6] Pet. App. 75a. Five of the six dentist members provided teeth whitening services and thus would directly benefit financially if lower-priced non-dentist suppliers of those services were excluded from the market. Pet. App. 60a.

B. The Rationale Underlying the Active Supervision Requirement Argues For Imposing It

The basic rationale underlying the active supervision requirement was made clear in *Patrick*. Active supervision of private parties is required because otherwise, "there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests." *Patrick*, 486 U.S. at 101.

Adam Smith set down the consensus among economists long ago: "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the

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[6] The reality that all board members do not participate in all state board decisions is one reason antitrust state action doctrine should focus on whether a board's market-participant members were a decisive coalition necessary to adopt the restraint at issue, rather than only on whether a formal majority of the board consisted of market participants.

public, or in some contrivance to raise prices."[7] Smith did not envisage anything would change if the competitors were granted state power to enforce their conspiracy. Consumers certainly cannot count on an unsupervised group of competitors appointed to regulate their own market to neglect their selfish interests in favor of the public's. Thus, when market participants regulate their own market and have a financial interest in those regulations, disinterested state supervision should be required for antitrust immunity not only under this Court's precedents but also as a matter of the federal antitrust policy adopted by Congress.

Petitioner incorrectly argues that the anticompetitive goals of the state and the market participant board members are aligned in a way that means the active supervision requirement adds nothing but bureaucracy. Pet'r Brief at 35-36, 42-43. However, a state legislature's willingness to displace competition with dental safety regulation leaves a host of judgment calls that the state legislature has not made about a particular topic like teeth whitening: such as just how much safer it is when done by dentists and whether any safety gains exceed the increased prices. Those judgment calls are instead made by the board, whose market participation makes it financially interested in exaggerating safety concerns and in perversely weighing increased prices as a positive rather than a negative. Thus, while a state legislature that allows regulation of unsafe dental practices clearly authorizes displacements of competition, the lack of clear

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[7] 1 ADAM SMITH, THE WEALTH OF NATIONS, bk. I, at 134 (George Bell & Sons 1908) (1776).

supervision means we can have no assurance that disinterested state officials concluded the specific restraint at issue was warranted.

C. *Parker* and *Omni* Support Denying State Action Immunity to Financially-Interested Market Participants

Petitioner claims *Parker* granted immunity to an unsupervised state commission "even though *a super-majority of the Commission's members were also market participants*." Pet'r Brief at 21 (emphasis in original). But this is simply untrue. Although Petitioner states that the state statute in *Parker* required six of nine commission members to be engaged "in the production of agricultural commodities as their principal occupation," Petitioner omits that the rest of that statutory sentence specified "but no two of these shall be appointed as representing the same commodity." 1939 Cal. Stat. ch. 894, § 3, p. 2488. Thus, the statute made clear that for any particular commodity being regulated, a supra-majority of the commission could *not* be financially-interested participants in the commodity market at issue. Moreover, in *Parker* the only challenge was to the raisin marketing program,[8] and only *one* of the eight commissioners was a raisin farmer

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[8] 317 U.S. at 344 ("The questions for our consideration are whether the marketing program adopted for the 1940 raisin crop under the California Agricultural Prorate Act is rendered invalid (1) by the Sherman Act, or (2) by the Agricultural Marketing Agreement Act of 1937, or (3) by the Commerce Clause"); Supplemental Brief for Appellants in *Parker v. Brown* at 2 ("We assume that no attack is intended upon the state statute itself but only as implemented by the particular 1940-41 Seasonal Marketing Program for Raisins here involved.")

who participated in the relevant raisin market and had a financial interest in restraining raisin competition.[9] Because all eight commissioners were named defendants, they presumably all voted to approve the raisin program, and thus there was no evidence that the one raisin farmer cast a decisive vote. Nor did any of the briefs claim that the raisin farmer's vote was decisive to the commission vote to approve the raisin program.

Petitioner also claims that treating state agents as private when they are market participants conflicts with *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365 (1991). But *Omni* itself interpreted *Parker* to hold that "immunity does not necessarily obtain where the State acts not in a regulatory capacity but as a commercial participant in a given market." *Id.* at 374-75; *see also Phoebe Putney*, 133 S. Ct. at 1100 (describing *Omni* as "leaving open the possibility of a market participant exception"). This language directly refutes Petitioner's claim that *Parker* and *Omni* conflict with treating state agents that are market participants as private for antitrust state action immunity. *Omni* also expressly reaffirmed the point that States may not

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[9] *See* "Liberal Prorate Board Named," The Rural Observer at 2 (April 10, 1940) (stating that the commission consisted of "Lyman Lantz, San Jose, prunes and apricots; Ira Redfern, Selma, raisins; James Langford, Lodi, grapes; Mark G. Johnson, Rio Oso, peaches; C. M. Brown, Redlands, citrus fruit; William P. Darsie, Walnut Grove, vegetables; Dr. Dean McHenry, UCLA, consumers; Preston McKinney, San Francisco, commercial handlers."); Transcript of Record in *Parker v. Brown* at 1-2, 5 (identifying those same persons as on the commission that approved the 1940 raisin program).

"exempt *private* action from the scope of the Sherman Act." 499 U.S. at 379 (emphasis in original).

Petitioner argues to the contrary because *Omni* rejected a co-conspirator exception. Pet'r Brief at 14, 30-31, 39-40, 45. But *Omni*'s rationale for rejecting this exception was that it would apply whenever a public official agreed to do what some private citizens urge, which would swallow up all regulation. 499 U.S. at 375. This reasoning hardly conflicts with denying immunity when the state agents are themselves market participants. Indeed, in support of its rejection of the co-conspirator exception, *Omni* cited the works of Areeda, Hovenkamp and Elhauge, *id.* at 375, precisely the same scholars who conclude that state agents who are financially-interested market participants must be treated as private. Moreover, *Omni* took pains to distinguish the rejected co-conspirator exception from the market participant exception that *Omni* concluded *Parker* was referencing. *Id.* at 374-75.

Omni also rejected the argument that state action immunity should be denied whenever an otherwise-immune state agency acts contrary to state law. *Id.* at 370-72, 378-79. But its reasoning was that such state law violations were better policed by state administrative law. *Id.* Again, this hardly conflicts with denying immunity to market participants, who Congress has decided are best policed by market discipline and cannot conspire to avoid such discipline under the antitrust law. Indeed, in support of its rejection of the claim that state law violations always vitiated state action immunity, *Omni* again cited Areeda and Hovenkamp, *id.* at 371-72, and Elhauge

took the same position, *see* 104 HARV. L. REV. at 692. There is thus plainly no conflict between that rejection and denying immunity to market participants.

Petitioner stresses that one of the state law violations mentioned by *Omni* was bribery, which Petitioner notes would give the public officials a strong financial interest. Pet'r Brief at 14-16, 40, 43, 45. But *Omni* was simply rejecting the general claim that state law violations should vitiate immunity, of which bribery was listed as just one example, not making any general determination of whether financial interest should affect whether an actor is treated as private rather than a state actor in the first place. Any discussion of bribery was also dicta since actual bribery was not alleged.[10] In any event, even if being bribed

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[10] Although Petitioner repeatedly asserts that the public officials in *Omni* were allegedly bribed, Pet'r Brief at 14-16, 40, in fact: "*No limiting factors, such as* evidence of illegal acts like *bribery* or kickbacks or evidence of a selfish or corrupt motive, *were included* in the description of the conspiracy exception in order to guide the jury." *Omni Outdoor Adver. v. Columbia Outdoor Adver.*, 891 F.2d 1127, 1146 (4th Cir. 1989) (Wilkins, J., dissenting) (emphasis added). Instead, the claim was that the public officials were influenced by campaign contributions. 499 U.S. at 367. That is not the same as bribery unless we are to condemn our whole campaign finance system as bribery. Nor do such campaign contributions constitute the sort of personal financial interest that triggers antitrust review because: "First, such contributions do not so much redound to the personal financial interest of the official as help that official stay in office. Since most legislators could earn far more outside office, presumably their desire to stay in office reflects their desire to exercise their political judgment on other issues, not a desire for financial gain. Second, campaign contributions are a thoroughly legal (indeed constitutionally protected) method of influencing the governmental process." Einer

does not automatically deprive a state official of state action immunity, that does not dictate the same answer for state agents who are financially-interested market participants exercising powers delegated to them by the state. First, state law provides an alternative remedy for bribery by making it illegal, but provides no remedy for agency decisions by market participants that are authorized by state law. Second, although the Sherman Act may not have been intended as a code of political ethics, 499 U.S. at 378-39, it was definitely intended to impose competitive market discipline when the relevant financial interest arises from market participation.

In short, even if the state officials in *Omni* were financially interested because of bribery, they were clearly not market participants, and *Omni* itself interpreted *Parker* to say that such market participation would deprive the actor of state action immunity. *Omni* thus supports the conclusion that financially-interested market participants should be treated as private, even if financial interest alone does not suffice to do so.

D. The Opposing Policy Arguments for Over-ruling this Court's Precedents Are Unpersuasive

Petitioner and its *amici* raise several policy arguments against treating state agents as private when they are financially-interested market participants, but none provide any persuasive reason to

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Elhauge, *Making Sense of Antitrust Petitioning Immunity*, 80 CALIF. L. REV. 1177, 1243 n.314 (1992).

overrule the above-described line of precedents that contradict their position. First, Petitioner and its *amici* argue that treating market participants as private requires judicially inadministrable inquiries into officials' independence and intent and whether their acts are in the public interest. Pet'r Brief at 45-47. But the market participant test requires no such inquiry. It simply asks whether the state agents participate in the relevant market in a way that *objectively* gives them a financial interest to restrain trade. True, without such a financial interest, officials are more likely to act independently and in the public interest, but whether they actually do so is not part of the market participant test. Petitioner also argues state actors may be biased for many other reasons like regulatory capture or the prospect of future employment, *id.* at 46-47, but that is irrelevant because what triggers antitrust review is not any form of bias but only the sort of financially-interested market participation that can be usefully subjected to competitive market discipline.

Second, Petitioner and its *amici* argue that appointing financially-interested market participants to state agencies provides necessary expertise. Pet'r Brief at 34, 48. But the state could obtain dental expertise without losing immunity by (1) hiring dentists as full-time employees, (2) appointing part-time agents who are retired dentists, dental academics, or otherwise not participating in the relevant market being restrained, or (3) as this Court held in *Allied Tube*, having boards of market participants submit their expert recommendations to disinterested state officials or courts that substantively review and approve those recommendations before they restrain

trade. Moreover, even state boards made up of market participants would have state action immunity as long as they are regulating matters in which they have no financial interest, such as when medical boards prohibit the use of ineffective drugs. And states can even have unsupervised boards dominated by those with financial interest so long as these boards limit their regulations to what antitrust law considers reasonable. These same alternatives rebut the claim by *amici* for Petitioner that denying state action immunity to financially-interested market participants would require states to subordinate public health concerns or choose structures that discourage involvement by conscientious experts.

Finally, Petitioner and its *amici* argue that applying antitrust to market participants that were delegated state authority violates federalism by interfering with the states' ability to staff their agencies how they want. Pet'r Brief at 13-14, 17. 33-36, 48-49. But Petitioner itself admits that a "general precept of federalism ... is that Congress clearly does not intend in the ordinary course to allow States to nullify federal regulation of private actors and thereby invert the Supremacy Clause." *Id.* at 20. States thus cannot overturn the fundamental premise of the Sherman Act that financially-interested market participants must be subject to the competitive market discipline that is policed by antitrust law. *See* Elhauge, *supra*, 104 HARV. L. REV. at 708-712. States may choose whoever they want to serve on state agencies, but if states choose to delegate the power to restrain trade to market participants, those actors must exercise that power in a way that complies with federal antitrust law.

If Petitioner's view of state immunity were adopted, then a state would be free to repeal the antitrust laws and substitute for competition in market after market the judgment of cartels such as the hypothetical Hollywood cartel with which we began. Such inverse preemption of federal antitrust law by state law is not allowed by existing Court precedent.

II. OCCUPATIONAL LICENSING BY FINANCIALLY-INTERESTED BOARDS IS BECOMING UBIQUITOUS AT GREAT COST TO CONSUMERS AND EXCLUDED WORKERS

It is particularly important for the Court to reaffirm its long line of authority applying antitrust law to financially-interested market participants, regardless of whether they are made state agents, because in recent decades the states have created a host of new licensing boards made up of market participants that restrain trade. The expansion of occupational licensing is dramatic, and in the vast majority of cases the regulation is self-regulation. A recent study of licensing boards in two sample states, revealed that licensed market participants constitute a majority of the members for over 90% of the boards in Florida and Tennessee. Edlin & Haw, *supra*, at 1157-64. This is typical of anecdotal accounts of licensing boards nationwide. *Id.* at 1103 n.50.

If this Court were to overrule its precedent and confer state action immunity on such boards even when they are unsupervised, then they would become free to undertake anticompetitive actions with no fear of antitrust suits.

A. Financially-Interested Occupational Licensing Is Rapidly Expanding

Once limited to a few learned professions, licensing is now required in over 800 occupations. MORRIS M. KLEINER, LICENSING OCCUPATIONS: ENSURING QUALITY OR RESTRICTING COMPETITION? 5 (2006). And once limited to minimum educational requirements and entry exams, licensing board restrictions are now a vast, complex web of anticompetitive rules and regulations. The explosion of licensing and the tangle of restrictions it has created should worry anyone who believes that fair competition is essential to national economic health.

In the 1950s, only about 5% of American workers needed a government-issued license to lawfully perform their jobs; by the 1970s, the figure was 15% and now it is roughly 30%. Morris M. Kleiner & Alan B. Krueger, *Analyzing the Extent and Influence of Occupational Licensing on the Labor Market*, 31 Journal of Labor Economics 1, 3-5 (2013). This trend is continuing both because the service sector of the economy—the most likely to be covered by licensing—continues to grow enormously, and because new "professions" continue to be added to the list requiring licensing. Recent examples include locksmiths, beekeepers, auctioneers, interior designers, tour guides, shampooers, and fortune tellers. Edlin & Haw, *supra,* at 1096.

The practitioner-dominated state boards that typically set license requirements have abused their power to set disproportionate requirements that serve to insulate incumbents from competition. Cosmetologists, for example, are required on average to have ten times as many days of training as Emergency

Medical Technicians, and hair braiders in many states must undertake such training, even though it is largely irrelevant to their occupation. *Id.* at 1096-97. In Alabama, unlicensed practice of interior design was a criminal offense until 2007. *Id.* at 1097 In Oklahoma, one must take a year of coursework on funeral service (including embalming and grief counseling) just to sell a casket, while burial without a casket at all is perfectly legal. *Id.*

Even traditionally licensed occupations, the so-called learned professions, use licensing restrictions to repress competition. In many states, dentists cannot legally employ more than two hygienists each, a restriction that raises demand for dentists. *Id.* And in some states, nurse practitioners must be supervised by a physician, even though studies show that nurse practitioners and physicians provide equivalent quality of care where their practices overlap. *Id.*

B. Economic Studies Show that Licensing Requirements Tend to Raise Prices without Much, If Any, Quality Improvement

Given that the lion's share of licensing boards are stacked with financially-interested market participants, it is not surprising that the licensing requirements they adopt have tended to increase prices without much, if any, improvement in quality. Economists have studied extensively the effects of these occupational licensing requirements on price. Where the studies have the statistical power to identify an effect, they tend to show an increase in price and a reduction in quantity. A 2000 study showed that tougher licensing, in the form of lower pass rates on the

qualifying exam, increased prices for dental services by 11%. Morris M. Kleiner & Robert T. Kudrle, *Does Regulation Affect Economic Outcomes? The Case of Dentistry*, 43 J.L. & ECON. 547, 572-73 (2000). Another recent study estimated that licensing requirements raise wages by 18%. Morris M. Kleiner, *Regulating Occupations: Quality or Monopoly?*, EMP'T RES. (W.E. Upjohn Inst., Kalamazoo, Mich.), Jan. 2006, at 2 tbl.1.

Similarly, most studies examining practice restrictions show that when a licensing board is more heavy-handed in dictating hours, advertising, or levels of supervision within a profession, the consumer prices are higher. For example, one team of researchers estimated that restricting the number of hygienists a dentist may employ increased the cost of a dental visit by 7%, resulting in an estimated $700 million annual cost to consumers ($1.7 billion after converting 1982 dollars to 2014 dollars). J. Nellie Liang & Jonathan D. Ogur, BUREAU OF ECON. STAFF REP. TO THE F.T.C., RESTRICTIONS ON DENTAL AUXILIARIES: AN ECONOMIC POLICY ANALYSIS 47 (1987). Restrictions on advertising by lawyers is associated with an increase in price, and in optometry, restrictions on advertising have been shown to inflate prices by at least 20%. John E. Kwoka, Jr., *Advertising and the Price and Quality of Optometric Services*, 74 AM. ECON. REV. 211, 216 (1984).

Of course, higher prices for services do not by themselves show that licensing is bad for consumers. The economic justification for licensing, that without it a free market for services is dysfunctional, suggests that if licensing is working to reduce market failures associated with information asymmetry and

externalities, it will increase the price *and* quality of services.

But while economists have shown that licensing significantly raises consumer prices, studies of licensing's effect on service quality paint a murky picture. Some studies show modest increases in quality, at least for some kinds of consumers, but other studies do not find that same effect. Edlin & Haw, *supra*, 1116-17. A few studies even claim to show that licensing reduces quality, perhaps because licensing protects incumbents from full exposure to market penalties from poor performance. *Id.* at 1117.

This research indicates that occupational licensing in the U.S. fails to appropriately trade off quality benefits and harm to competition. This should not surprise anyone, given that most licensing restrictions are created by practitioner-dominated boards with financial incentives to restrain competition even when it does not improve quality. *Id.* at 1103. It is entirely predictable that when competitors make up their own rules about who can compete and how, they will serve their own interests at the expense of the consumer and excluded workers.

C. Financially-Interested State Licensing Boards Resemble Traditional Cartels, But Are Even More Powerful

Antitrust review is entirely appropriate for curbing the excesses of occupational licensing because the anticompetitive effect has a similar effect on the market—and in particular consumers—as does traditional cartel activity. *Id.* at 1132-33. This close fit between the Sherman Act's intended target and the

economic harm of excessive licensing can be seen in the functional equivalence of the restrictions promulgated by occupational boards and the business practices held unlawful under § 1. For example, the Sherman Act has been used to condemn combinations of competitors using written tests to exclude competitors, imposing advertising restrictions, and predicating membership in a trade association on having a "favorable business reputation." *Id.* Boards use these very same techniques to suppress competition in the name of occupational licensing.

Thus, licensing schemes can be similar to many cartel agreements in substance, which alone may justify antitrust liability. Licensing boards need not fix prices directly. They may, as in this case, limit supply by excluding competitors or they may limit the intensity of competition among market participants.

Making matters even worse for consumers, licensing schemes come in a particularly durable form. *Id.* at 1133. Licensing boards, by their very nature, face few of the cartel problems that can erode price and output agreements between competitors. By centralizing decision-making in a board and endowing it with rulemaking authority through majority voting, competitors overcome the hurdle of agreement that ordinarily inhibits cartel formation. Cheating is prevented by imposing legal and often criminal sanctions—backed by the police power of the state—on those who break the rules. Finally, most cartels must fend off new market entrants from outside the cartel that hope to steal a portion of its monopoly rents. For licensed occupations, licensing deters entry and

ensures that all market participants (at least those practicing legally) are held to its restrictions. *Id.*

The similarities between cartel activity and licensing restrictions suggest that licensing is a natural target for Sherman Act scrutiny. This does not mean that per se condemnation of self-interested board activity is necessarily appropriate. It simply means that antitrust review is triggered, and this Court has developed nuanced antitrust standards for assessing professional self-regulation. *See California Dental Ass'n v. FTC*, 526 U.S. 756 (1999). Even unsupervised boards dominated by competitors are free to enact regulations deemed reasonable under the antitrust laws.

To be sure, for states that don't actively supervise boards, clarifying the threat of antitrust liability may encourage them to alter board membership to make their decisions less self-interested, but that is exactly what antitrust should seek. States wishing to regulate professions without having to answer to an antitrust suit have several options. Active supervision is one obvious option. Another way in which a state could immunize an unsupervised licensing board from antitrust liability would be to change its composition. A state could limit a board's exposure to antitrust liability by appointing experts who are full-time state employees or are part-time but are retired, academics, or otherwise not currently participating in the market being regulated. Or a state could appoint market participants but limit them to regulating matters on which they have no financial interest. Finally, states could reduce practitioner representation and fill the rest of the board seats with members representing

other interests. Having a diverse membership that includes consumers, civil servants, labor economists, and members from adjoining professions would not only serve as a prophylactic against liability, but also make it more likely the board considered and resolved any anticompetitive concerns.

These sorts of changes would not require abandoning sensible regulation in the public interest, but would require reversing the recent trend of using state boards dominated by financially-interested market participants to promulgate rules and regulations—and thus would be a important step toward politically accountable, procompetitive regulation. Contrary to the claims of *amici* supporting Petitioner, such changes would not disrupt tradition because the vast expansion of financially-interested occupational licensing is a recent phenomenon. Nor is Petitioner right that denying state action immunity to financially-interested market participants would undermine legitimate reliance interests, Pet'r Brief at 58, because this Court's precedents clearly deny immunity to such boards, so states allowing such financially-interested occupational licensing must, if anything, have been relying on antitrust to serve as a constraint on unsupervised boards.

III. ELECTION BY MARKET PARTICIPANTS SUFFICES TO TREAT THE BOARD AS PRIVATE, BUT IS NOT NECESSARY WHERE THE BOARD MEMBERS THEMSELVES ARE MARKET PARTICIPANTS

In this case, not only were the dentist board members financially-interested market participants,

but they were also elected by all dentists in the market. Pet. App. 40a. Contrary to the concurrence below, such selection by market participants should not be deemed necessary to make the board private where, as here, a decisive coalition of the board were financially-interested market participants.

Limiting antitrust exposure to boards elected by market participants would conflict with this Court's precedent, which instead makes clear that it is the relevant actor's financial interest as market participant that requires treating it as private. *See supra* Part I. Indeed, limiting the doctrine in that way would require overruling both *Goldfarb*, which treated the State Bar as private even though the legislature had by statute appointed it to be an administrative agency, 421 U.S. at 776 n.2, and *Continental Ore*, which treated a financially-interested state agent as private even though it had been appointed by a disinterested executive official, 370 U.S. at 695, 702 n.11. This Court has not made manner of selection essential to the "private" inquiry because a board of competitors remains self-interested and in need of market discipline even if is appointed by the governor. Indeed, if appointment by the governor or state legislature sufficed to confer state action immunity, then any state could do precisely what this Court's precedent prohibits—authorize private businesses to violate the antitrust laws—by simply appointing those businesses to be state agents.

If the Court were to limit antitrust review to boards selected by market participants, that would drastically narrow its precedent because financially-interested state licensing boards are usually not elected by fellow

industry members. *See* Edlin & Haw, *supra*, at 1157-64 (finding that the vast majority of occupational licensing boards, 93% in Tennessee and 95% in Florida, are governor-appointed). A holding that limited antitrust exposure to peer-elected boards would thus have very little effect on the anticompetitive abuses of licensing boards in this country. Further, for those few boards that would be covered by such a rule, like the North Carolina Dental Board, antitrust liability could be avoided simply by altering the manner of selection. This would make little difference to the self-interest of the board, since governors are usually required *by statute* to select industry members for a majority of board seats. *Id.* at 1157-64.

While being elected by market participants is not *necessary* to treat a board as private, it should *suffice* to do so. After all, if board members are elected not by the public at large, but only by market participants, they will naturally represent the interests of those market participants in restraining trade. Indeed, even an ordinary private cartel might pick an employee with a flat salary to fix prices for it. The employee would not itself be a market participant and would have no direct financial interest in restraining trade, but he surely knows which side his bread is buttered on and will act to advance the interests of the firms that put him in office. Indeed, if this Court were to hold that state agencies could be treated as private *only* when board members were themselves financially-interested market participants, then a state could easily authorize private cartels by simply creating state agencies full of salaried employees who are elected by the cartel businesses.

In short, a state agent should be treated as private if he *either* is a financially-interested market participant *or* is elected by such market participants. Either should suffice, and thus neither is necessary to treat the state agent as private when the other is present. State action immunity requires that an actor who is both financially disinterested *and* politically accountable to the general electorate substantively control the terms of the relevant restraint before it is imposed on the market. Elhauge, *supra,* 104 HARV. L. REV at 671, 696, 707, 715. When either factor is absent, immunity should be denied.

CONCLUSION

The judgment of the court of appeals should be affirmed, with the clarification that restraints of trade imposed by state agencies are private (and thus require not only clear authorization but also active supervision for state action immunity) if a decisive coalition on that agency either comprised or was elected by market participants financially interested in the restraint at issue.

Respectfully submitted,

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APPENDIX

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APPENDIX A

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AMICUS CURIAE BRIEF

No. 13-534

In the Supreme Court of the United States

NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE ASSOCIATION OF DENTAL SUPPORT ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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In the Supreme Court of the United States

No. 13-534

NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE ASSOCIATION OF DENTAL SUPPORT ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS[1]

The Association of Dental Support Organizations (Association or ADSO) is a nonprofit industry association, representing over thirty dental support organizations (DSOs). DSOs provide essential services to thousands of dentists across the United States. By delivering non-clinical services such as human resources, bookkeeping, billing, and accounting, DSOs allow affili-

[1] The parties have consented to the filing of amicus curiae briefs in support of either party or of neither party in letters on file with the Clerk. No counsel for any party authored this brief in whole or in part, and no person or entity, other than amicus curiae or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

ated practitioners to focus on patient care. The Association's members play a vital role in supporting the delivery of affordable, accessible, and high-quality dental care to patients, including patients in areas underserved by high-cost traditional dental practices.

This case presents issues relating to the anticompetitive behavior of licensing boards dominated by self-interested market participants and how that anticompetitive behavior can adversely affect public access to affordable dental care. ADSO is acutely aware of the anticompetitive risks inherent in allowing self-interested market participants to regulate their own field of practice. Acting on the incentive to restrict competition, state dental boards have in recent years actively sought to limit or exclude DSOs from entering their markets and have undertaken a variety of restrictive activities that prevent DSOs from operating efficiently and effectively. Indeed, ADSO members have direct experience with the North Carolina Board of Dental Examiners, which has harmed competition by asserting an overly expansive definition of the practice of dentistry. Such anticompetitive practices by state dental boards have resulted in higher costs to patients and less dental care to underserved communities, to the detriment of dental health in this country.

INTRODUCTION AND SUMMARY

This case began with the North Carolina State Board of Dental Examiners (Board) sending dozens of cease-and-desist letters to non-dentists in an effort to drive non-dentist competitors out of the North Carolina market for teeth whitening services. The Board is composed almost entirely of practicing dentists who

have a financial stake in preventing competition for teeth whitening services. Yet the Board's self-serving policy choices were not subject to review by independent state officials acting out of concern for public health and safety. Indeed, many types of anticompetitive acts by market-participant dominated boards similar to those of the Board at issue here would never be subject to any independent review, much less effective review of the substance of the board's policy choices. In such circumstances, there is no basis for immunizing the Board's actions from scrutiny under the federal antitrust laws.

I. The doctrine of state-action immunity is limited to policies clearly articulated by the state itself and does not permit the state to immunize unsupervised anticompetitive action by a group of market participants simply by denominating them a state agency. See *Parker* v. *Brown*, 317 U.S. 341, 352 (1943). Instead, private market participants claiming state-action immunity must show that they are (1) acting in accordance with a clearly articulated state policy and (2) "actively supervised" by independent state officials. *Cal. Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (*Midcal*). The active supervision prong of the *Midcal* test is designed to guard against the "real danger" that private parties claiming the mantle of state authority are in fact engaging in anticompetitive conduct "to further [their] own interests, rather than the governmental interests of the State." *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34, 47 (1985).

The state-action immunity doctrine, a construction of the Sherman Act, *Parker*, 317 U.S. at 351, represents

a careful balance between the fundamental national value of free market competition and principles of federalism. Requiring private market participants to be actively supervised by independent state officials appropriately respects state sovereignty while simultaneously guarding against the tangible risk that market participants, exercising coercive state power, will act in their own self-interest and to the detriment of the public at large. The cease-and-desist letters in this case—sent by a board comprised almost entirely of practicing dentists who stand to profit from performing teeth whitening services at high cost—exemplify the "real danger" that the active supervision prong is designed to guard against.

II. The risk that market participants acting as state regulatory boards will use their authority to further their own self-interest, and thereby deprive the public of the benefits of competition, is apparent. Incumbents have strong economic incentives to protect the status quo and perpetuate existing business models, wholly apart from concerns about delivering high-quality products and services. By suppressing competition that results in higher quality, higher output, increased efficiency, and reduced costs, unsupervised boards comprised of market participants reduce consumer access, including access to health care.

ADSO members have experienced this risk firsthand in the market for dental services. DSOs provide dentists, many of whom lack business training, with critical business support that allows affiliated dentists to focus their time on patient care instead of paperwork and other administrative tasks. The resulting increase in available clinical dentistry improves access

to care for patients in need. Moreover, by increasing efficiency, and reducing costs, DSO-affiliated dentists can reach underserved populations, such as by increasing the number of dentists who accept insurance. Given the lack of access to dental care in states like North Carolina, improved access is a critical public health issue. Yet, the North Carolina Board has fought entry of DSO-affiliated dental practices because they threaten the established solo practitioner model that serves the interests of established market participants. The North Carolina Board's actions tellingly mirror those of the American Medical Association and state affiliates that, forty years ago, employed medical ethics guidelines in an effort to stifle competition from new business models like Health Maintenance Organizations and hospital affiliated practices.

Other examples of market participants implementing anticompetitive policies under the guise of state regulatory authority abound, spanning numerous industries and professions.

Boards have expansive powers, and market participant members of those boards can use them to serve narrow self interests. Many actions by the boards are not subject to any judicial review at all, and even when they are, the judiciary is likely to defer to the boards' policy choices. There is no guarantee, in the absence of an active state supervision requirement, that the policy choices of a state board dominated by market participants will reflect the public policy choices of the state.

ARGUMENT

I. MARKET PARTICIPANTS CANNOT CLAIM STATE-ACTION IMMUNITY FOR ANTICOMPETITIVE CONDUCT NOT ACTIVELY SUPERVISED BY THE STATE

State-action antitrust immunity is generally "'disfavored'" in light of the "fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws." *FTC* v. *Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1010 (2013) (quoting *FTC* v. *Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992)). As a result, private market participants who engage in anticompetitive conduct are immune from federal antitrust liability only if they satisfy the "rigorous" *Midcal* test, requiring both action in accordance with a clearly articulated state policy and active state supervision. *Patrick* v. *Burget*, 486 U.S. 94, 100 (1988) (citing *Cal. Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (*Midcal*)). Market participants must make this heightened showing because of the "real danger" that they will engage in anticompetitive behavior to "further [their] own interests, rather than the governmental interests of the State." *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34, 47 (1985).

The Board's formalistic approach, which turns exclusively on the market participants' designation as a state agency, would upset this balance. By eliminating the active supervision requirement, the Board proposes to eviscerate the protection that ensures that market participants clothed with state authority are using that

power to further the state's interests, rather than their own.

A. This Court Has Frequently Held That State Agencies Comprised Of Market Participants Enjoy Antitrust Immunity Only If They Are Actively Supervised By The State

The state-action doctrine construes the Sherman Act not to reach conduct of the States themselves. *Parker* v. *Brown*, 317 U.S. 341, 351 (1943). At the same time, "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." *Ibid.* Thus, this Court has long required states to actively supervise market participants if those market participants are to receive state-action immunity. The active supervision requirement has been applied as well to private market actors who were designated a state agency and exercised state regulatory authority. See, *e.g.*, *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 790 (1975); *Midcal*, 445 U.S. at 105-106; *Patrick*, 486 U.S. at 100-105; *Ticor*, 504 U.S. at 635-637.

In *Goldfarb* v. *Virginia State Bar*, this Court concluded that the Virginia State Bar was not entitled to federal antitrust immunity even though it was undisputedly "a state agency by law." 421 U.S. at 790. The State Bar had established a minimum fee schedule for certain legal services. *Id.* at 788-792. This Court stressed that although "the State Bar is a state agency for some limited purposes," that fact alone "does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members" when there is "no indication * * * that the Virginia Su-

preme Court approves" the Bar's anticompetitive actions. *Id.* at 791. Because the State Bar was comprised of market participants acting in their own self-interest, without supervision from the Virginia Supreme Court, it did not enjoy state-action immunity. See *ibid.* As the Court noted, the State Bar had "voluntarily joined in what is essentially a private anticompetitive activity, and in that posture cannot claim it is beyond the reach of" federal antitrust law. *Id.* at 792. *Goldfarb* thus demonstrates that a state agency is not automatically entitled to state-action immunity when it is comprised of market participants. See *id.* at 790-792; see also *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978) (plurality opinion) ("*Goldfarb* therefore made it clear that, for purposes of the *Parker* doctrine not every act of a state agency is that of the State as sovereign.").

In cases where state agencies have been granted state-action immunity, the Court has done so after finding active state supervision. In *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977), for example, the Court held that the Arizona State Bar's enforcement of lawyer fee advertising rules was immune from federal antitrust liability after finding that the disciplinary rules "reflect[ed] a clear articulation of the State's policy with regard to professional behavior," *and* that those rules were "subject to pointed re-examination by the policy maker—the Arizona Supreme Court—in enforcement proceedings." *Id.* at 362. Similarly, in *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, the Court recognized state-action immunity for state rate bureaus after observing that "the State Public Service Commissions actively supervise[d]

the collective ratemaking activities of the rate bureaus." 471 U.S. 48, 62 (1985). Active state supervision, or lack thereof, is the common thread that explains the Court's decisions whether state agencies composed of market participants will be afforded state-action immunity for anticompetitive conduct that affects their own interests.

B. State-Action Immunity Is Designed To Ensure That State Bodies Act To Further The Public, Rather Than Private, Interest

The principles animating the state-action immunity doctrine demonstrate why a state regulatory board comprised of market participants is subject to the active supervision requirement. The state-action doctrine construes the Sherman Act not to reach certain otherwise illegal conduct out of respect for state sovereignty. See *Parker*, 317 U.S. at 352 (granting antitrust immunity because the state, "as sovereign, imposed the restraint as an act of government"); see also *Phoebe Putney*, 133 S. Ct. at 1010 (state-action immunity applies "only when it is clear that the challenged anticompetitive conduct is undertaken pursuant to a regulatory scheme that 'is the State's own'" (quoting *Ticor*, 504 U.S. at 635)). The doctrine does not simply allow the state to "cast[] a 'gauzy cloak of state involvement' over what is essentially private anticompetitive conduct." *Southern Motor Carriers*, 471 U.S. at 57 (quoting *Midcal*, 445 U.S. at 106).

The active supervision prong of the *Midcal* test thus serves the critical function of ensuring that anticompetitive policies will further state regulatory interests, as opposed to private self-interest. See *Patrick*,

486 U.S. at 100-101 ("[T]he active supervision requirement mandates that the State exercise ultimate control over the challenged anticompetitive conduct."). As this Court explained in *Ticor*, the purpose of the active supervision prong is "to determine whether the State has exercised sufficient independent judgment and control so that the details of the [anticompetitive policy] have been established as a product of deliberate state intervention." 504 U.S. at 634. If the anticompetitive conduct is not truly that of the state, the Sherman Act remains fully applicable. See *Southern Motor Carriers*, 471 U.S. at 61 (explaining that the state-action doctrine "represents an attempt to resolve conflicts that may arise between principles of federalism and the goal of the antitrust laws, unfettered competition in the marketplace").

The danger that market participants will use state authority to further their own self-interest requires that they be afforded immunity from federal antitrust laws only if active supervision by independent state officials ensures that their actions are the "product of deliberate state intervention." *Ticor*, 504 U.S. at 634. With good reason, this Court has recognized that market participants are "presumed to be acting primarily" in their own interests. *Town of Hallie*, 471 U.S. at 45. That risk is not diminished, but indeed increases, when the state grants a group of market participants regulatory authority. Without active state supervision, there can be no "realistic assurance" that the anticompetitive conduct of a state agency composed of market participants "promotes state policy, rather than merely the party's individual interests." *Patrick*, 486 U.S. at 101; see also *Town of Hallie*, 471 U.S. at 47 ("Where a pri-

vate party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State."). This is why the active supervision requirement itself is not satisfied merely by ensuring fidelity to process but requires some element of substantive review. See *Patrick*, 486 U.S. at 102 ("This statutory scheme does not establish a state program of active supervision over peer-review decisions. The Health Division's statutory authority over peer review relates only to a hospital's procedures; that authority does not encompass the actual decisions made by hospital peer-review committees." (footnote omitted)). Indeed, only when the state has "examine[d] individual private conduct, pursuant to [a] regulatory regime, to ensure that it comports with the stated criterion * * * can the underlying conduct accurately be deemed that of the state itself, and political responsibility for the conduct fairly be placed with the state." FTC, *Report of the State Action Task Force* 54 (2003), http://www.ftc.gov/sites/default/files/documents/advocacy_documents/report-state-action-task-force/stateactionreport.pdf.

The Board's attempt to draw an analogy between itself and municipalities or state agencies that are not comprised of market participants is misplaced. Those state entities do not present the same institutional risks as a body dominated by private market participants. Municipalities and sub-state governmental entities not composed of market participants must show that they are acting in accordance with a clearly articulated state policy to displace competition. *Phoebe Putney*, 133 S. Ct. at 1010-1011 (state hospital authority); *Town of Hallie*, 471 U.S. at 46-47 (municipalities). But

they need not satisfy the active state supervision prong because they are, by their nature, "likely to be exposed to public scrutiny" and their officials are likely to be "checked to some degree through the electoral process." *Town of Hallie*, 471 U.S. at 45 n.9. Their "position in the public eye" provides independent "protection against antitrust abuses." *Ibid.* There are no such checks against "antitrust abuses" by the Board.

The Board's invocation of federalism interests rings hollow for similar reasons. The state-action doctrine, like principles of federalism generally, "serves to assign political responsibility, not to obscure it." *Ticor*, 504 U.S. at 636. Only "real compliance with both parts of the *Midcal* test will serve to make clear that the State is responsible for the [restraint] it has sanctioned and undertaken to control." *Ibid.* A state may choose to displace the federal policy in favor of market competition, but it must do so in a fashion that ensures transparency and accountability by those who are responsible to the public at large, not by simply cloaking a group of private market participants with the mantle of state authority. Simply designating a group of private market participants a state agency neither protects against their abuse of authority to serve private interests nor provides assurance that the state's elected leaders will be held accountable for its policies.

II. If Unsupervised, State Bodies Like The Board Can Use Their Considerable Power To Further Private Financial Interests To The Detriment Of The Public Health

The risk that state regulatory boards dominated by market participants will use their state-granted author-

ity to further their own self-interest—to the detriment of the public—is clear and concrete. ADSO members have experienced such anticompetitive conduct firsthand in the market for dental support services. But dentistry is hardly unique. Examples of market participants engaging in self-serving anticompetitive conduct in the name of the state span numerous professions. Market participants have strong economic incentives unrelated to public health to protect the status quo, perpetuate existing business practices, and exclude lower cost competition. There are ample historical examples of such anticompetitive conduct by market incumbents in the name of consumer welfare, such as early attempts by the American Medical Association (AMA) to exclude HMOs in the name of medical ethics. State boards dominated by market participants, like the North Carolina Dental Board, exert considerable power and regulate a vast array of industries, and market participants acting without active state supervision have been able to use their expansive regulatory powers improperly to suppress competition. By restricting a more efficient model for the delivery of administrative dental support services, state dental boards like North Carolina's would effectively force dentists to complete the various administrative support tasks in their practices personally, outsource the administrative tasks to several less-efficient vendors instead of a single integrated DSO, or some combination thereof. This type of board action artificially limits the supply of dental services, which disproportionately impacts access to care for the most underserved populations.

A. Market Participant Board Members Have Strong Incentives Unrelated To Professional Quality To Protect Existing Business Models

Although the Board and its amici wrap themselves in the mantle of maintaining professional standards and protecting public health, the reality is far more complicated. Market participant board members, no less than other market incumbents, have strong financial incentives to preserve existing economic models and to erect entry barriers to disruptive competition. Although their anticompetitive efforts are frequently undertaken in the name of professional ethics or public health, the effect is to suppress new, more efficient ways of supporting and providing health care more cost effectively and to a broader population. Cf. *Nat'l Soc'y of Prof'l Eng'rs* v. *United States*, 435 U.S. 679, 694-695 (1978) (justification for competitive bidding ban agreed to by rivals "on the basis of the potential threat that competition poses to the public safety and the ethics of its profession is nothing less than a frontal assault on the basic policy of the Sherman Act"). Tellingly, many of the most prevalent and successful models for practicing medicine today were actively suppressed by physician organizations for decades under the banner of medical ethics. Hostility to non-traditional business models continues today in the dental profession on the part of the North Carolina and other state dental boards.

1. *There is a long history of market incumbents erecting barriers to new business models in the name of ethics*

As the American Dental Association (ADA) has recognized, in dentistry as in other medical fields, there are a wide variety of economic models under which health care can be provided. Albert Guay et al., *A Proposed Classification of Dental Group Practices*, Health Policy Inst. Research Brief, Am. Dental Ass'n (Feb. 2014) (ADA Classifications), http://www.ada.org/~/media/ADA/Science%20and%20Research/HPI/Files/HPIBrief_0214_2.ashx. These include insurer-affiliated HMOs that employ medical professionals, non-profit organizations that serve disadvantaged populations, practitioners employed directly by governmental agencies, traditional practitioner-owned practices, and practitioners who affiliate with management service organizations (MSOs). *Ibid.* MSOs can undertake responsibility for "the major non-professional aspects of a practice," such as "personnel management, supplies and equipment purchases, office space, patient flow, office policies, practice analytics * * * , revenue management and marketing." *Ibid.*[2]

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[2] According to the ADSO website, DSOs provide a wide range of business support for dentists, including: "marketing plans, accounts receivable/payable, and tax reports," "site selection/lease negotiation," "staffing, benefit programs and oversight," "[a]ccess to capital for capital investments," "[p]rofessional marketing," and "[e]conomies of scale" for purchasing supplies. Ass'n of Dental Support Orgs., http://theadso.org/professional-resources/your-dental-career (last visited Aug. 5, 2014).

In a market free of protectionism, "no one form of dental practice will overwhelm the market" but rather "a variety of practices" would likely "evolve to satisfy the varied demands of patients and other stakeholders in the dental care system." ADA Classifications at 7. As the ADA acknowledged, the "key factors for successful innovation" should be that changes "enhance quality of care, efficiency of care delivery and availability of care for all who seek it." *Ibid.* Unfortunately, existing stakeholders' self-interest in protecting the status quo frequently causes them to oppose new economic models that can bring increased efficiency and access to care.

Many of the most successful models for providing medical services were once forbidden by the AMA as contrary to professional "ethics." In 1975, the FTC sued the AMA for, among other things, perpetuating a code of ethics designed "to preclude competition by group health plans, hospitals and other organizations not directly under the control of physicians." *In re Am. Med. Ass'n*, 94 F.T.C. 701, 980, 1016 (1979), aff'd sub nom. *Am. Med. Ass'n* v. *FTC*, 638 F.2d 443 (2d Cir. 1980), aff'd by equally divided court, 455 U.S. 676 (1982). In particular, the AMA had prohibited arrangements that denied patients "free choice of physicians" on the ground that "mutual benefit associations, so-called health and hospital associations, and other forms of contract practice" had given rise to a "destructive competition." *Id.* at 1012-1013 (internal quotations omitted).

The FTC found that the purpose and effect of the provision was "not solicitude for the rights of patients" but rather to "impair[] competition from alternative

providers in the medical service market by discouraging use of innovative arrangements that can deliver services at lower cost." *In re Am. Med. Ass'n*, 94 F.T.C. at 1015. Similarly, the AMA had adopted an ethical prohibition against methods of competition other than fee-for-service in an attempt to "preclude[] the use of salaries or other arrangements" by "hospitals [and] prepaid health plans," and similarly proscribed arrangements with non-physicians in an effort "to prevent physicians from associating with many HMOs or prepaid health care plans." *Id.* at 1016, 1018. Though these ethics rules had been adopted in the name of maintaining the quality of medical care, the FTC found that the AMA had "go[ne] far beyond anything that might be reasonably related to the goal of preventing use of improper medical procedures." *Id.* at 1012.[3]

2. *The Board's suppression of DSOs mirrors the AMA's earlier suppression of HMOs and other business models*

While the AMA may have abandoned its "anti-HMO" activities, *In re Am. Med. Ass'n*, 94 F.T.C. at 1017 n.67, that type of attitude continues to be prevalent among many state dental boards, including the North Carolina Board. The strong self-interest among existing market participant dentists to oppose new business arrangements is clear. Dentists have tradi-

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[3] The issue on appeal that divided the appellate judges was not whether the AMA's ethics rules had been used to restrain competition, but whether the AMA had already abandoned its anticompetitive posture in light of this Court's *Goldfarb* decision. See *Am. Med. Ass'n* v. *FTC*, 638 F.2d 443, 454 (2d Cir. 1980) (Mansfield, J., dissenting), aff'd by equally divided court, 455 U.S. 676 (1982).

tionally practiced as solo practitioners. Many current dentists have a considerable part of their net worth (and expected retirement funds) tied up in their practice. Dentists in solo or small practices therefore have a strong incentive to retain the value of their practices so they can sell their practices to the next generation of dentists. Private dentists, acting together under color of state authority as state boards, have thus attempted to erect barriers to, and taken affirmative steps to suppress, economic models other than small practices, despite the success of those models in other medical fields. Indeed, whereas the AMA estimates that only 18% of medical doctors were practicing within a solo practice in 2012, among dentists more than 57% were still practicing in solo practices in 2012. See Carol K. Kane & David W. Emmons, *New Data On Physician Practice Arrangements: Private Practice Remains Strong Despite Shifts Toward Hospital Employment* 5, 9 (2013), http://www.nmms.org/sites/default/files/images/2013_9_23_ama_survey_prp-physician-practice-arrangements.pdf; ADA Classifications at 2.

In the absence of regulatory hostility, MSOs (or DSOs as they are referred to in the dental field) would offer considerable advantages to dentists engaged in private practice. As the FTC has noted, "dentists contract with DSOs to obtain a variety of back-office, *non-clinical* functions, allowing these dentists to focus primarily on the treatment of patients, and less on the business management aspects of running a dental practice." Letter from Susan S. DeSanti, Director, Office of Policy Planning, Federal Trade Commission, to the Hon. Stephen LaRoque, North Carolina House of Representatives (FTC NC DSO Letter) 1 (May 25, 2012),

http://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-letter-nc-representative-stephen-laroque-concerning-nc-house-bill-698-and-regulation/1205ncdental.pdf. Because dentists "learn[] little in dental school about running a business," many "look[] to outside companies to help finance the practice, manage billing, handle payroll, file insurance and execute other administrative tasks." *Id.* at 4 (internal quotation marks omitted).

Allowing dentists to "organize their practices in the way they find most efficient, consistent with quality care," benefits patients as well. FTC NC DSO Letter at 1. Because DSOs operate with greater efficiencies, competition from DSOs offers "the potential for lower prices, improved access to care, and greater choice." *Ibid.* Indeed, one dentist commented that his affiliation with a DSO "helped our dental practice operate so efficiently that we can charge lower rates and accept dental insurance from patients." *Id.* at 4. Finding a dentist, especially one who accepts insurance, can be a challenge, especially in North Carolina, where the number of dentists per capita is low and there are relatively few DSO-affiliated dentists (who accept insurance at significantly higher rates than others). See *id.* at 3 (North Carolina has "historically ranked near the bottom of the fifty states in terms of dentist-to population ratio"); *id.* at 6 (" 'dental practices affiliated with DSOs accept commercial insurance at a significantly higher rate than practices unaffiliated with DSOs' " (quoting Robert Fontana, Chief Executive Officer of Aspen Dental Management, Inc.)).

But the very benefits that DSO-affiliated practices can provide consumers, such as lower costs and better

insurance coverage, provide incentives for market participant members of the Board to suppress those arrangements. And, in fact, the FTC has noted "the Board's hostile attitude and actions against DSOs." FTC NC DSO Letter at 6.

The Board's attempt to suppress competition from DSO-affiliated dentists mirrors to a significant degree the AMA's efforts to combat HMO and hospital association contracts with doctors forty years ago. State dental boards, including North Carolina's, have used their regulatory authority to suppress DSO affiliation and preserve the existing solo or small practice model by advancing a broad definition of the "practice of dentistry" that includes many business-support services that DSOs provide. Many states, like North Carolina, define the "practice of dentistry" using vague, general terms, such as any person who "[o]wns, manages, supervises, controls, or conducts, either himself or by and through another person or other persons, any enterprise wherein" certain medical services are performed. N.C. Gen. Stat. § 90-29(b)(11).[4] Seizing on ambiguous statutory

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[4] Other states use similarly general terms like "manage" to define the practice of dentistry. See, *e.g.*, Md. Code Ann., Health Occ. § 4-101(l); Mo. Rev. Stat. § 332.071; N.J. Stat. Ann § 45:6-19; Wash. Rev. Code § 18.32.020(3). Statutory vagueness undermines the very purpose of the clear articulation standard, which is "designed to help identify conduct that warrants shelter from antitrust laws on grounds of federalism." FTC, *Report of the State Action Task Force* 25 (2003), http://www.ftc.gov/sites/default/files/documents/advocacy_documents/report-state-action-task-force/stateactionreport.pdf. Instead, a general statutory grant of ambiguous authority is often misconstrued by self-interested market participants as a state policy to displace competition across an entire industry. The two are not the same.

language like "manages" or "controls," boards have sought to sweep business functions far removed from clinical care of patients within the exclusive province of licensed dentists, in order exclude competition from DSO-supported practices and maintain the status quo.

The North Carolina Board, for example, sought enactment of a bill that would define "management" of a dental practice to include (in a non-exhaustive list) such non-clinical functions as the purchase of supplies and inventory, the purchase or lease of equipment or office space, payment of vendors, establishing hours of operation, or use of "sweep accounts." See North Carolina H.B. 698, proposed § 90-40.2(e) (2011), http://www.ncga.state.nc.us/Sessions/2011/Bills/House/HTML/H698v1.html. The Board also sought for itself the authority to "review" (with no deadline for responding) all "management arrangements" and to "conduct random audits, inspections, and investigations" of the "books and records of any management company which enters into a management arrangement with a licensed dentist." *Id.* § 90-40.2(s). By contrast, traditional dental practices, unaffiliated with a DSO, would not be subject to the threat of "random" searches. Maryland's board is attempting the same thing, but through regulation rather than legislation, and further would include within the definition of "control" of a dental practice "decision[s] regarding the advertising of the practice," provider contracts with third-party payors (like insurance companies), and employment of "ancillary personnel." Notice of Proposed Action, 41 Md. Reg. 531 (proposed May 2, 2014) (to be codified at Md. Code Regs. 10.44.34), http://dhmh.maryland.gov/regs/Pages/10-44-34-Owner

ship-and-Management-of-a-Dental-Practice-(BOARD-OF-DENTAL-EXAMINERS).aspx.

The Texas State Board of Dental Examiners, a majority of whose members must be practicing dentists, see Tex. Occ. Code § 252.001(a), has also been extremely hostile to DSOs. The Texas board has likewise recently been considering proposed amendments to its regulations that would prohibit any dentist from entering a contract where a non-dentist would exercise sole control over certain non-clinical, wholly administrative tasks such as purchasing dental and non-dental equipment, accounting, bookkeeping, payroll, advertising and marketing, legal services, soliciting and negotiating contracts with third-party payors, and hiring and firing non-licensed or licensed staff. See Unofficial Proposed Amendments to 22 Tex. Admin. Code § 108.70 (2014); see also Unofficial Proposed Amendments to Ga. Comp. R. & Regs. 150-8-.01(s) (2014) (Georgia Board of Dentistry considering proposed amendments to its regulations that would define "unprofessional conduct" to include entering a contract where a non-dentist will perform administrative functions like scheduling, or provide financial services such as making or guaranteeing a loan in certain circumstances).[5]

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[5] The Texas board has also advocated for new legislation that would allow it to control virtually the entire DSO industry. See S.B. 151, 2012 Leg., 83(R) Sess. (Tex. 2012). The proposed legislation would require DSOs to register with the Texas board and pay annual fees, would place limits on what can be included in dental service agreements, and would impose restrictions on when DSO-affiliated dentists may share patient records with the DSO. See *ibid.* Although the Texas board has framed its campaign against DSOs as an effort to combat Medicaid fraud, there is no evidence

3. *In the absence of active state supervision, state boards construe ambiguous grants of authority broadly, to limit competition*

Even without new statutory authority (which the legislature declined to enact), the North Carolina Board has taken aggressive steps to exclude competition from DSO-affiliated dentists. An FTC review of the North Carolina Board's practices in connection with the proposed legislation revealed "strong evidence of the Board's hostility toward dentists' use of DSOs to help manage the non-clinical aspects of their practices." FTC NC DSO Letter at 6. In particular, the FTC noted that the Board had taken action "against a dentist who attempted to affiliate with a potential DSO entrant, and prohibited the DSO from entering North Carolina for five years," even though "there were no

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that concerns about healthcare fraud were specific to DSO-affiliated dentists. See John Davidson, *State Regulation of Dental Service Organizations: A Solution in Search of a Problem*, Tex. Pub. Policy Found., Ctr. for Health Care Policy (Apr. 2013). As one commentator observed, it is "difficult to see [the Texas board's] attempt to impose a regulatory regime on DSOs in particular as anything other than a protectionist scheme designed to benefit non-DSO-supported dental practices by giving them a competitive advantage." *Ibid.* The Kansas and Nevada dental boards have also taken steps to suppress DSOs, reading state laws to require that DSOs register with the boards, even though the Kansas statute contains no registration requirement whatsoever and the Nevada statute only requires registration if a person "manages" the business of a dental practice. See Kan. Stat. Ann § 65-1424; Nev. Rev. Stat. § 631.388. Requirements like these deter many dentists from working with a DSO out of fear that the increased scrutiny could result in adverse regulatory action by hostile state boards. See FTC NC DSO Letter at 5 & n.37.

allegations the dentist * * * was providing negligent or low quality care" or "any evidence that non-licensed individuals conducted any patient care" at the dentist's clinic. *Id.* at 2 & n.8 (internal quotation omitted). The FTC noted that "several DSOs ha[d] changed their entry plans, either not entering the North Carolina market or scaling back their entry plans, because of the Board's hostile attitude and actions against DSOs." *Id.* at 6.

The Board's cease-and-desist letters in this case were not issued in response to consumer harm, but in order to protect the private economic interests of the members who are practicing dentists and their constituent dentists. In about 2003, the Board began receiving letters from practicing dentists complaining about non-dentist providers of teeth whitening services. Pet. App. 75a. The complaints noted that the non-dentists in question were offering teeth whitening services *at lower prices*. *Ibid.* Almost none of the complaints referenced concern for harm to consumers. *Ibid.* The Board responded to these complaints by sending cease-and-desist letters with the "goal" of stopping non-dentists from providing teeth whitening services. *Id.* at 76a; see also *id.* at 103a-104a (statement of Board's Chief Operations Officer that the Board was "going forth to do battle" with non-dentist providers of teeth whitening services). The Board even issued cease-and-desist letters on the basis of a complaint alone, without any investigation into potential harm, and despite the fact that certain forms of teeth whitening products are so safe that they are available for purchase over the counter. *Id.* at 76a. Indeed, there was little question whether dentists needed to *perform* the teeth whiten-

ing services—they do not. Rather, dentists want to insist that teeth whitening services be performed subject to their "supervision," so that they can earn a profit on the service. See *id.* at 75a (explaining that the dentists' complaints referred to the low prices offered by non-dentist teeth whiteners). In that sense, the experiences of those offering teeth whitening services are much like the experiences of nurses, who are frequently the target of medical boards dominated by physicians who try to force nurses to work subject to a doctor's "supervision," limiting nurses' ability to practice independently within the full scope of their training and education and harming patient access. See Nursing Ass'ns Amicus Br. pt. I.A.

The list of state regulatory authorities seeking to entrench their positions against disruptive entrants is long, and demonstrates that the interest in suppressing competition often has nothing to do with, and is even contrary to, the interests of customers and patients. The Louisiana State Board of Embalmers and Funeral Directors—of which eight out of nine members are licensed funeral directors or licensed embalmers—ordered a group of Catholic monks to stop selling caskets priced significantly lower than those offered by funeral homes. *St. Joseph Abbey* v. *Castille*, 700 F.3d 154, 159 (5th Cir. 2012). While the board argued that the regulations were intended to protect consumers and also benefit public health, the Fifth Circuit found that the licensing requirements did nothing to ensure the quality of caskets, nor did they further any supposed public health benefits, especially in light of the fact that state law did not require use of a casket at all. See *id.* at 157, 162-165.

In similar fashion, state cosmetology boards have attempted to limit who can perform African-style hair-braiding services. In Washington, the State Department of Licensing threatened fines and disciplinary action against a small business owner if she continued to provide African hair braiding services without a state cosmetology license. See Complaint, *Sylla* v. *Kohler*, No. 2:14-cv-00885 (W.D. Wash. June 17, 2014). Other states have done likewise. See Jacob Goldstein, *So You Think You Can Be a Hair Braider?*, N.Y. Times, June 12, 2012, http://www.nytimes.com/2012/06/17/magazine/so-you-think-you-can-be-a-hair-braider.html?_r=2&adxnnl=1&pagewanted=1&adxnnlx=1403546484-CyQBbR0yazUdJsolQXkDHA (detailing Utah board's denial of an application for exemption from the requirement to hold a cosmetology license to practice hair braiding). Ironically, these boards insist on cosmetology education and licensure, even though cosmetology school provides no training on how to perform African hair braiding. *Ibid*; see also Alana Rocha, *Eyebrow Threading Regulations to Go Before High Court*, Tex. Tribune, Feb. 25, 2014, http://www.texastribune.org/2014/02/25/texas-eyebrow-threading-industry-under-microscope (noting Texas Department of Licensing and Regulation determination that eyebrow threading required cosmetology licensure, despite the fact that the service was not taught at cosmetology school).[6]

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[6] The Louisiana Horticulture Commission, which is comprised almost exclusively of market participants, see La. Rev. State § 3:3801, has acted in a similar fashion. Until 2010, one's ability to act as a retail florist required passing an examination that included a hands-on floral arrangement test administered by the Commission, that was graded based on entirely subjective criteria. *Id.*

State veterinary boards comprised of market participants have likewise attempted to extend their monopolies. In 2010, the Texas Veterinary Board enacted a regulation prohibiting non-veterinarians from filing animals' teeth, a service that is particularly important for horses. See Letter from Susan S. DeSanti, Director, Office of Policy Planning, Federal Trade Commission, to Loris Jones, Texas State Board of Veterinary Medical Examiners (Aug. 20, 2010), http://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-comment-texas-board-veterinary-medical-examiners-concerning-rule-573.17-regarding-animal-teeth-floating/100910texasteethfloating.pdf. As the FTC explained in opposing the regulation, the Texas board "cite[d] no evidence about injury to horses attributable to" non-veterinary horse teeth filers, nor did it "address how veterinary supervision might be related to improved animal health." *Id.* at 3. More recently, the Arizona Veterinary Board has asserted that only licensed veterinarians can work as animal massage therapists. See Karl Dickey, *Arizona crushes small business owners with anticompetitive laws*, examiner.com (Mar. 5, 2014), http://www.examiner.com/article/arizona-crushes-small-business-owners-with-anti-competitive-laws. Yet no similar licensing requirement exists for human massage therapists, and veterinarians are not required to learn massage in veterinary school. See *ibid.*

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§ 3:3807(A); David Muller, *Lawmakers weed out portion of state florist exams*, neworleanscitybusiness.com (June 16, 2010), http://neworleanscitybusiness.com/blog/2010/06/16/lawmakers-weed-out-portion-of-state-florist-exams.

The above experiences demonstrate that market participants do not shed their self-interest when they take positions on state professional boards. They continue to have an interest in suppressing competition in the form of new business models or lower cost providers. Indeed, the additional power they enjoy as a state regulatory body makes it more likely that they will succeed in suppressing competition. State dental boards, like the North Carolina Board, have succeeded in maintaining solo practice as the dominant business model long after it ceased to be the dominant practice for medical doctors. The threat that such boards pose to competition warrants requiring them to satisfy the active state supervision requirement in order to claim the benefit of state-action antitrust immunity.

B. By Suppressing Competition, State Boards Dominated By Market Participants Harm Consumers, Including By Reducing Access To Critical Health Care

Failure to subject state boards bent on erecting entry barriers to an active supervision requirement threatens consumers with substantial harm. The "fundamental national values of free enterprise and economic competition" confer real and practical benefits on consumers. See *FTC* v. *Phoebe Putney*, 133 S. Ct. 1003, 1010 (2013). Competition produces efficiencies that decrease costs and expand access. See *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 694-695. In recent years, most areas of the medical profession have seen an evolution and diversification of business models, which has resulted in lower prices while maintaining quality of care. The market for dental services, by contrast, has remained largely under the control of boards dominated

by market participants who have suppressed competition, with the consequence of reduced access to dental care for consumers.

Competition in the market for administrative dental support services, especially the efficiency generated by DSOs, leads to better access to care. By bringing managerial experience and administrative services to dental practices owned by medical professionals, DSOs allow quality dental care to be provided at lower costs to patients. DSOs can help small dental practices to "finance the practice, manage billing, handle payroll, file insurance and execute other administrative tasks." FTC NC DSO Letter at 4 (quoting Dr. Clifton Cameron). By taking over the business aspects of dentistry from dentists who are ill-trained for that task, DSOs "allow[] dentists to spend more time on patient care and less time on administrative tasks." *Id.* at 6. These increased efficiencies can help reduce costs and thereby enable DSO-affiliated dentists to more readily "accept dental insurance from patients." *Id.* at 4 (quoting Dr. Clifton Cameron).

Entry of DSOs into a state can dramatically improve access to dental care. In part due to their greater efficiencies, " 'dental practices affiliated with DSOs accept commercial insurance at a significantly higher rate than practices unaffiliated with DSOs, resulting in discounted services and lower out-of-pocket expenses for commercially insured patients.' " FTC NC DSO Letter at 6 (quoting Robert Fontana, Chief Executive Officer of Aspen Dental Management, Inc.). Moreover, the DSO business model emphasizes new entry and "focuses its entry and expansion efforts on markets in which dentists are in short supply." *Ibid.* By opposing

entry of DSOs, state dental boards like North Carolina's reduce access to dental care in their states.

Allowing more efficient and lower cost business models in dentistry could help redress a significant gap in dental care. The disproportionate incidence of oral diseases within the nation's most vulnerable groups, including children and the poor, is well-documented. See, *e.g.*, Dep't Health & Human Servs., *Oral Health in America: A Report of the Surgeon General* vii (2000), http://www.nidcr.nih.gov/DataStatistics/SurgeonGeneral. According to a GAO study, "42 percent of adults with tooth or mouth problems did not see a dentist in 2008 because they did not have dental insurance or could not afford the out-of-pocket payments, and in 2011, 4 million children did not obtain needed dental care because their families could not afford it." GAO, *Dental Services: Information on Coverage, Payments, and Fee Variation*, (Sept. 2013), http://www.gao.gov/assets/660/657454.pdf.

In North Carolina, whose Board has aggressively fought the entry of DSO-affiliated practices, access to dental care is particularly inadequate. North Carolina consistently ranks near the bottom of the nation in terms of dentist-to-population ratio. See A Report on Health Care Resources in North Carolina, North Carolina Health Professions 2012 Data Book 23-24 (effective Apr. 2014), http://www.shepscenter.unc.edu/hp/publications/2012_HPDS_DataBook.pdf. And a vast majority of North Carolina's counties continue to be listed as Dental Health Professional Shortage Areas. See Dep't Health & Human Servs., Health Resource & Servs. Admin. (updated June 23, 2014), http://hpsafind.hrsa.gov/HPSASearch.aspx. By providing managerial

and administrative functions that improve efficiency and lower costs, DSOs could significantly expand access in the North Carolina market.

But despite the critical problem of inadequate access to dental care, many state dental boards continue to restrict it. In addition to the efforts to restrict DSO-affiliated practices detailed above, state boards impose other requirements that favor the traditional business model but inhibit increased access to care. In recent years the Louisiana State Board of Dentistry, for example, has imposed requirements on mobile dentist practices above and beyond those that apply to office-based dental practices. For instance, the Board authorizes unannounced inspections of mobile clinics, but generally prohibits them for traditional brick-and-mortar dentist facilities. See La. Admin. Code tit. 46, § 313(J). As the FTC noted in objecting to these new burdens, additional regulations on mobile dentists are unlikely to improve quality of care, yet they will reduce access to care by increasing costs and, in some cases, discouraging mobile clinics. See Letter from Susan S. DeSanti, Director, Office of Policy Planning, Federal Trade Commission, to Barry Ogden, Executive Director, Louisiana State Board of Dentistry (Dec. 18, 2009), http://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-louisiana-state-board-dentistry-concerning-proposed-modifications-louisianas/091224commentladentistry.pdf.

The risk of anticompetitive regulation decreasing consumer access is not unique to dental boards, but rather inherent to state boards dominated by market participants. In 2011, for example, the North Carolina State Board of Opticians, which is comprised of five li-

censed dispensing opticians and just two consumer members, N.C. Gen. Stat. § 90-238, considered proposed regulations on out-of-state vendors and online merchants that would not apply to office-based practices. Specifically, the proposed regulations would subject out-of-state optical practices and internet sites to onerous and costly registration requirements not applicable to North Carolina businesses and would require internet sites to give customers additional notices and waivers not required of traditional brick-and-mortar practices. See Letter from Susan S. DeSanti, Director, Office of Policy Planning, Federal Trade Commission, to Sue M. Kornegay, NC State Board of Opticians (Jan. 13, 2011), http://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-north-carolina-state-board-opticians-concerning-proposed-regulations-optical-goods/1101ncopticiansletter.pdf. As the FTC explained in its letter opposing the regulations, these additional requirements not only lacked any "health and safety rationales," they would also impose greater costs on North Carolina consumers. *Ibid.*

The active state supervision prong of the state action immunity doctrine will reduce the likelihood of boards adopting anticompetitive regulation that reduce consumer access. Active supervision requires the state, acting as the state, to make a substantive judgment that self-interested market actors acted with fidelity to state policies. See *Patrick* v. *Burget*, 486 U.S. 94, 102 (1988). When such regulation does occur, the active state supervision requirement will ensure that the policy reflects the judgment of independent state officials responsible to consider the interests of the

general public rather than merely the interests of private market participants.

C. Limited Review Not Amounting To Active Supervision Will Fail To Stop Boards From Suppressing Competition

Market participant members of state boards have considerable powers at their disposal. In the absence of an active state supervision requirement, those boards can wield that authority with little independent check by disinterested state officials. Although the Board suggests that the proper check on a board's self-interest is that provided by administrative law principles and judicial review, see Pet. Br. 38, many of the anticompetitive actions that a state board can take are not immediately subject to review. And deferential judicial APA-type review of a board construing ambiguous statutory terms is no substitute for the check provided by independent state officials with authority to review the substance of a board's action as a matter of policy.

The North Carolina Dental Board's cease-and-desist letters to non-dentist providers of teeth whitening services are prime examples of how a state regulatory body can utilize state-granted authority to suppress competition without its conduct being subjected to any effective independent review. The Board sent cease-and-desist letters to 29 non-dentist teeth whitening manufacturers and providers. Pet. App. 76a. These letters were on official Board letterhead and stated in capitalized lettering: "NOTICE AND ORDER TO CEASE AND DESIST," "NOTICE TO CEASE AND DESIST," "CEASE AND DESIST NOTICE," or

"NOTICE OF APPARENT VIOLATION AND DEMAND TO CEASE AND DESIST." See, *e.g.*, J.A. 10, 12, 17, 19, 24, and 26. Many of the letters quoted or referenced North Carolina state laws and regulations. The Board's March 21, 2007 letter to the owner of a local hair salon is demonstrative. *Id* at 10. In that letter, the Board explained that it was "investigating a report that you are engaged in the unlicensed practice of dentistry," noting that "[p]racticing dentistry without a license in North Carolina is a crime." *Ibid.* The letter "ordered" the salon to "CEASE AND DESIST" any "activity constituting the practice of dentistry," and it quotes certain excerpts of state law. *Ibid.* The effect of the letter was to give the appearance that the Board was giving a legal command with which the salon had to comply. *Ibid.*

Similarly, the letters to mall operators cited to North Carolina state law, asserted that "The unauthorized practice of dentistry is a misdemeanor," and claimed that the teeth whitening taking place at the mall kiosks was "illegal." J.A. 22. As the FTC explained in its opinion below, part of the reason that the Board's letters were effective in causing non-dentists to stop providing teeth whitening services was the "perception of some recipients that the letters carried the force of law." Pet. App. 77a. The Board also enlisted the help of the North Carolina Board of Cosmetic Art Examiners, which posted a notice on its website that teeth whitening "constitutes the practice of dentistry," noting that "unlicensed practice of dentistry in our state is a misdemeanor." *Id.* at 77a-78a. The effect of this post was exactly what the Board desired, for at

least some cosmetologists stopped providing teeth whitening services as a result. *Id.* at 78a.

Importantly, the Board could succeed in suppressing competition before any review of its conduct. The Board's response to the FTC suggested that recipients of the letters were free to "simply ignore the letter and assert as a defense to the Dental Board's request for an injunction their contention that their activities do not constitute the practice of dentistry or seek a declaratory ruling or judgment on the issue of whether their activities constitute the practice of dentistry." See Response to Complaint, *In re N.C. Bd. of Dental Exam'rs*, No. 9343, ¶ 19 (F.T.C. July 6, 2010) (citing N.C. Gen. Stat. § 150B-4), http://www.ftc.gov/sites/default/files/documents/cases/130604ncboardopinion.pdf. The Board's response only underscores how the Board's unsupervised acts themselves deter new entrants from challenging incumbents. Recipients who believed they were under a lawful order to cease their activities were put to the burden of initiating litigation in order to establish their right to continue to engage in teeth whitening services. Such anticompetitive threats are especially likely to succeed without challenge when directed at small businesses or third parties with little to gain from a challenge, such as the mall operators. The cost to them of challenging the Board's order would likely be far more than the rent received from teeth whitening kiosks.

As with this example, in many other instances, anticompetitive board actions will not be subject to review at all. To the extent a state's administrative review mechanism requires final agency action, board actions like soliciting the North Carolina Cosmetology

Board's support would not be subject to review. Non-binding guidance warning that a board views certain actions as illegal would not be final agency action subject to immediate review, nor would a letter threatening, or even the initiation of, costly investigation. See N.C. Gen. Stat. § 150B-43; cf. 5 U.S.C. 704.

Even if judicial review is available, such review may not encompass the substance of the board's anticompetitive policy. Where, for example, a board is construing an ambiguous statutory term, courts may be inclined to defer to the board's construction under principles of agency deference. Thus, judicial review is unlikely to provide an effective check on a board's choice to promote the self-interest of market participant members over the interests of the general public. Effective review of a board's anticompetitive policy can only occur if the reviewing officials have authority to review the *substance* of the action as a matter of public policy. The requirements for state action immunity ensure that the state actually passes on the substance of conduct undertaken by actors purporting to exercise state power. See *Patrick*, 486 U.S. at 102. There is no reason to jettison the active supervision requirement for obtaining immunity from the Sherman Act, where, as here, the absence of state supervision means the substance of the Board's anticompetitive policy has not been reviewed by independent state officials.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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AUGUST 2014

AMICUS CURIAE BRIEF

No. 13-534

In The
Supreme Court of the United States

THE NORTH CAROLINA STATE
BOARD OF DENTAL EXAMINERS,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Fourth Circuit**

BRIEF OF *AMICUS CURIAE* NEIL AVERITT IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Petitioner is a multi-member board that exercises certain authority over the practice of dentistry in North Carolina. Most of its members are dentists who compete in the market for teeth-whitening services and who are elected by other dentists. In a determination upheld by the court of appeals and not challenged here, the Federal Trade Commission (FTC) concluded that the petitioner had engaged in concerted anticompetitive conduct that had the effect of expelling the dentists' would-be competitors from the market for teeth-whitening services. The question presented is as follows:

Whether the court of appeals correctly upheld the FTC's determination that the state-action doctrine did not exempt petitioner's conduct from federal antitrust scrutiny.

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INTEREST OF THE *AMICUS CURIAE*

Neil Averitt has practiced antitrust law for over forty years, thirty-seven of them on the career staff of the Federal Trade Commission. He worked on a number of state-action cases, and was a member of the agency's State Action Task Force, whose report provides part of the background for the present litigation. He retired from federal service in 2013 but retains an interest in seeing the law in the area applied efficiently and well.[1]

SUMMARY OF THE ARGUMENT

This brief discusses the practical mechanisms of active supervision. The Petitioner and its *amici* have argued that state regulatory boards cannot be supervised without introducing undesirable burdens and inefficiencies in the governmental process. But they are greatly overstating the difficulties. We will show this by examining the range of administrative arrangements, already in use in several states, which demonstrate that it is possible to provide effective supervision at moderate cost. States have further narrowed their tasks by devising principled lists of the particular topics that most require supervision.

[1] No attorney for any party authored this brief in whole or in part, and no person or entity other than the *amicus* has made a monetary contribution to the preparation or submission of this brief. All parties to this action have given blanket consents to the filing of *amicus* briefs.

As a result, state governments and the courts will be quite able to adapt to any holding that requires supervision of boards. Moreover, the Court has an opportunity to provide additional guidance on these issues if it wishes. It has latitude in doing so, because many of the prior decisions of the Court on standards of supervision arose in the context of supervising private rate-setting bureaus, which pose special and different questions. We therefore conclude that there are no practical obstacles to a requirement for active supervision of state boards.

ARGUMENT

NO MAJOR PRACTICAL OR ADMINISTRATIVE PROBLEMS STAND IN THE WAY OF REQUIRING ACTIVE SUPERVISION OF FINANCIALLY INTERESTED STATE BOARDS

This brief addresses just one single question. The Court may conclude that, in principle, financially interested boards should be subject to active supervision. However, it may be concerned about the practical consequences of such a principle. This brief therefore discusses that issue. It examines the administrative procedures that several different states have already put in place to provide active supervision, and shows that a number of workable and tested options are available. It also examines the legal principles that have already clarified just which particular kinds of a board's activities, out of

all the actions that a board takes, are most in need of supervision. The law on both these points is sufficiently developed to let the present case be decided without concern for unanticipated consequences. Moreover, the Court has the opportunity to provide further clarification if need be.

Throughout this case, the best approach to the practical mechanics of supervision will involve balancing valid but conflicting interests, rather than starkly choosing one interest over another. Certainly the fundamental dispute in the case involves such a conflict between valid truths. On the one hand, unsupervised, self-interested boards are always under a temptation to limit competition for the financial benefit of their profession. The public needs to be protected from those obvious risks. On the other hand, states need to have some discretion to organize their affairs as they please. In particular, they need to have the option of including active members of a profession on a regulatory board in order to take advantage of their expertise. The question is how to balance these goals. The answer is that once supervision is found necessary in principle, the best methods of supervision will try to find the least-cost, greatest-benefit accommodation between them. Fortunately, developments in individual states, and in individual litigations, have shown that there are many practical ways to go about this balancing.

A. States Have Identified Many Forms of Active Supervision, Which Shows That It Is Practical to Provide Sufficient Oversight of Interested Boards

First of all, there are a number of procedures that states can use to provide active supervision while still allowing the boards to provide the benefits of their expertise. The Dental Board and its *amici* have contended that supervision will lead to immense waste and paralysis. That is surely too dire a view. This is suggested by the approaches already being used:

1. A board might be supervised by a single employee of the state government, who possesses the necessary specialized knowledge of the profession involved. Something of this sort is done in Rhode Island, where a single "dental administrator" is named to supervise the investigatory and other activities of the board. This individual is named through a selection process that ensures that he or she is acceptable to a variety of stakeholders, including the dental profession, the governor, and the state department of health. *See* R.I. General Laws § 5-31.1-5(1).

2. A still simpler variant might also permit sufficient supervision. A single individual in the governor's office could be authorized to oversee the actions of a group of substantively related boards – for example, boards in the health professions – under a suitable standard of review. Even this simple measure

would serve to clarify the political responsibility for the board's actions, which is one of the chief goals of the state action doctrine. *See FTC v. Ticor Title Insurance Co.*, 504 U.S. 621, 636 (1992) (federalism "serves to assign political responsibility, not to obscure it").

3. A board might be housed in the relevant substantive state executive agency, and the head of that agency would need to review and sign off on its actions. This is the broader context of the Rhode Island approach. There the board, acting under the dental administrator, may develop proposed rules and regulations, but adopting them requires the approval of the director of the department of public health. *See* R.I. General Laws § 5-31.1-4(1), (9).

4. All of a state's boards could be housed within a single general umbrella agency, which provides common administrative support services, and also exercises some limited substantive supervision on important policy issues. This is the approach taken by California. There the Department of Consumer Affairs was established in 1970, building on predecessor organizations dating back to the 1920s. It is presently made up of most of the major professional boards in the state, including those regulating dentistry, medicine, optometry, accountancy, architecture, and barbering. Cal. Bus. & Prof. Code § 101. For the most part each of these boards continues to exist as a "separate unit." *Id.* at § 108. Their decisions on licensing standards are specifically not subject to review by the department's director. *Id.* § 109. Nonetheless, the

director has control or influence on certain topics. A board may not sue another agency of government without the permission of the director, *id.* at § 132 (subject to a limited override); and the director may review the disciplinary system of a board, and make recommendations for changes to the board or the legislature, *id.* at § 116.

5. A state's boards might be still more tightly consolidated, and folded into a central agency that oversees all the licensed occupations, where they will make recommendations to the agency, but where the agency head will be the one to take the formal action. Utah has adopted this model. There the Division of Occupational and Professional Licensing was established to "administer and enforce all licensing laws of Title 58." Utah Code Ann. § 58-1-103. The duties assigned to the division include adopting rules, investigating possible violations, initiating lawsuits, and seeking injunctions. *Id.* at § 58-1-106. The role of the boards is to make recommendations on these actions – on appropriate rules and suitable approaches on policy and budget matters. *Id.* at § 58-1-202.

In all these ways the state can take advantage of the knowledge of practicing members of the profession, but can exercise control of the resulting actions.

It is worth noting that any of these approaches could be put in place fairly easily through a single statute specifying the procedures applicable to all of a state's boards.

We do not yet know which if any of these approaches will be legally sufficient. But there are clearly many practical models to work from. And there are no doubt other forms of supervision that would also pass muster for state action purposes. All that is needed is a sufficient indication that the final decision that comes out of this process is truly the state's own.

B. Practical Supervision Does Not Require That All Actions of an Interested Board be Overseen

To keep supervision a practical exercise, there should also be limits on the number of board actions that must be reviewed. It is neither necessary nor practical for every routine action to be reviewed by an independent bureaucracy.

Some such limits already exist. To begin with, courts will reach the questions of supervision and sufficient review only as to board actions that are – or are alleged to be – violations of the antitrust law. Only then will the board need to defend itself. This fact sets an initial limit on the kinds of actions subject to the supervision requirement. Only actions that potentially raise antitrust issues will need to be supervised.

However, reliance on this one principle is not a fully satisfactory response to the question. Sometimes the scope of antitrust liability is unpredictable, and sometimes allegations of antitrust liability might be

made too broadly. Almost by definition, governmental actions control and limit the business conduct that would otherwise take place, and so almost by definition any governmental action is open to the charge that it has unduly lessened competition. That open-ended risk may have an inhibiting effect on board decisions, and may prompt the state to create an overly elaborate supervisory bureaucracy to compensate for it. It would be desirable to introduce greater clarity.

State legislation and federal case law have therefore already begun to identify more specific lists of topics to be supervised. These principles will at least provide useful guidance to the states, focusing the efforts of state supervisors on the areas most likely to produce antitrust problems, while in other respects limiting their intrusions on the boards:

1. A state might concentrate its supervision on certain named kinds of particularly important actions, such as regulations, lawsuits, or litigation threats. All of the states named above have made these kinds of distinctions. In California, the boards retain their discretion over licensing standards, but are supervised on the initiation of inter-agency lawsuits. Cal. Bus. & Prof. Code at §§ 109, 132. In Utah, boards retain their power to establish a passing score on examinations, even while they can only make recommendations on rules and budgets. Utah Code Ann. § 58-1-202. In Rhode Island, the dental board can direct the director of the department of health to issue licenses to qualified applicants, even while it

needs the director's approval to issue regulations. R.I. General Laws § 5-31.1-4.

2. Supervision might be required for actions that directly affect entry into the business that the board regulates. Supervision of this kind has been required, for example, for the actions of private physicians who participated in a state's peer review system, and who allegedly voted to deny hospital privileges to a doctor who had opened a competing practice. *See Patrick v. Burget*, 486 U.S. 94, 100-01 (1988).

3. Alternatively, affirmative approval might not be required for any defined set of actions, but instead the reviewing official might be routinely informed of all the board's actions by being given copies of minutes and agendas. He or she might review these under a "negative option," with the power to inquire more closely into any particular matter that raises questions. Because all board actions will be open to state scrutiny under a negative option plan, all will have been duly supervised in that sense. If the reviewing official selects a reasonable proportion of matters for further inquiry, that could be sufficient to show that all of them had been actively considered. *Cf. Ticor Title Insurance*, 504 U.S. at 638 (criticizing negative option programs only where it appeared that no critical review at all had taken place).

It is possible – not certain, but possible – that some robust forms of focused supervision will count as supervision of a board's activities overall. In other

words, they may let the board be counted as "supervised" even with respect to decisions on which specific active review is not shown. This is a novel issue, involving the question of just what it means to supervise a board, which in turn leads to fundamental questions of federalism and statutory construction. As the Court explained in *Parker*, Congress chose to exempt certain forms of state action from the Sherman Act, both as a matter of judgment that the risks to competition were less in that context, and in recognition of the fact that the federal structure of the country requires preserving certain areas of state discretion. *Parker v. Brown*, 317 U.S. 341, 350-51 (1943). These same factors may tell us something about the likely intent of Congress with respect to state professional boards. Congress did not defer to private action, but it did give measured deference to state governments. Financially interested boards should be treated as private parties, and made subject to supervision, but their governmental aspects may still be relevant in determining the exact scope of the necessary supervision. If such an intent exists, it should be implemented in the kinds of simple practical terms that are appropriate to a quasi-constitutional principle. We can be confident that a financially-interested board acts for the state if it is sufficiently supervised. And it is arguably supervised closely enough to reflect state policy as long as certain key functions and decisions are overseen.

Here again, we cannot be sure which of these approaches to defining the relevant areas of supervision will be found sufficient in a particular case. But it is clear that there are a substantial number of options for states to choose among, including some safe ones that will suit those states that wish to avoid problems.

C. The Court Has the Opportunity to Further Clarify the Standards Applicable to the Two Previous Issues If It Wishes

This case can be decided without getting deeply into any of these complexities. The Dental Board's action here was completely unsupervised. Once the Court determines that supervision in some form was needed, then it can simply affirm the decision of the Fourth Circuit. Before doing so the Court may wish to satisfy itself that a supervision requirement will not create truly serious administrative problems. The precedents and experience recounted under the previous headings should provide the necessary level of assurance. They show that states and the lower courts will have sufficient tools and options available as they work through the implications of the decision here.

However, the Court might wish to do something more than that. This case touches on basic issues of national rights, legislative intent, and federalism. The Court may wish to provide guidance for the further development of the law, to provide greater

assurance that state oversight and lower court decisions will develop within a range that is both useful and legally sufficient.

The Court may wish to provide guidance, first of all, on the question of what forms of board supervision are sufficient. The Court might feel able to endorse one or more of the existing state approaches at the present time. Or it might prefer to leave the issue for further exploration. In that event it would still be helpful to identify certain elements that should be present in a plan of supervision, or to indicate the range of options that exists.

The Court may also wish to provide more guidance on the types of board actions that must be supervised. The law on this point will involve the construction of the Sherman Act, in light of the balance that Congress intended between the national public right to the benefits of Sherman Act competition on the one hand, and the rights of states to make use of certain problematic forms of organization, if they wish, on the other hand. The law here will be new, because financially-interested but nonetheless governmental boards present circumstances significantly different from the legislatures, municipalities, and purely private organizations that the Court has previously considered.

This and other aspects of the case involve a balancing of interests. Any guidance that the Court can give will help to make the results of that analysis more predictable.

D. The Standards for Supervising Interested Boards Are Different From the Standards Necessary for Supervising Private Rate-Setting Bureaus

The Court has latitude in providing this guidance because of a final point. Many prior cases on the standards of active supervision have involved the special context of private rate-setting organizations – associations of competitors that propose uniform rates to a state regulator. *See, e.g., Ticor Title Insurance, supra,* 504 U.S. at 628-29; *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48, 50 (1985). The standards to come out of those cases, while often providing helpful principles, are not the right standards for final judgment here. Where a professional board is set up as a state agency – even an agency that is made up of "private actors" for certain state action purposes – it is entitled to somewhat more latitude than a private rate bureau. This is true with respect to both the procedures of review and the subjects of review.

First of all, procedurally, the state board will not always need as much detail of oversight. The price agreements that come out of a rate bureau are subject to an especially searching review. At the very least they call for a "pointed reexamination" by the state. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97, 106 (1980) (in context of vertical price agreements). Ideally, the state review will also incorporate certain specified procedures that are known to support an independent judgment, such

as notice, hearings, and a written decision. *See Kentucky Household Goods Carriers Ass'n*, 139 F.T.C. 404, 417 (2005), *aff'd per curiam*, 2006 U.S. App. LEXIS 21864 (6th Cir., Aug. 22, 2006). All this is appropriate because horizontal price fixing, and other price-determining agreements, are a fundamental concern of antitrust policy, and they need to be carefully controlled. "No antitrust offense is more pernicious than price fixing." *Ticor Title Insurance, supra,* 504 U.S. at 639. It is also practical to make use of even quite elaborate and time-consuming review procedures in that context, because a rate bureau makes proposals for new rates only at long intervals. A professional regulatory board, on the other hand, frequently deals with different, non-price issues, some of which will have more ambiguous welfare effects, and all of which are presented in much greater numbers. The review of its actions therefore neither can nor should always be as close.

Professional boards are also entitled to somewhat greater latitude as to the proportion of their actions that should be subject to review. Private rate bureaus are commonly focused just on the one subject of price agreements. It therefore makes sense for the state to closely monitor all of their initiatives. A professional regulatory board, by contrast, will be considering a much wider range of issues, many of them routine and recurring. In those circumstances a less comprehensive, more flexible selection of subjects for review will be more realistic and should still be "meet for the case." *Cf. California Dental Ass'n v. FTC*, 526 U.S.

756, 781 (1999) (discussing sliding scale in context of rule of reason).

CONCLUSION

State boards that are made up of members of the regulated profession are rife with the possibility of self-interested conduct, and should be subject to active supervision before a state action defense is available. If the Court reaches this conclusion on the merits, it should not hesitate to act out of concern that doing so may open the door to unforeseen or adverse practical consequences. Many different forms of active supervision are available, and many states are already experimenting with various approaches that could be used.

Not all of the state programs will necessarily provide fully adequate supervision under the standards that the Court may announce. But that is not the point. The point is that those state programs are models, demonstrating procedures that can be adapted without undue difficulty to provide whatever supervision the courts decide is needed, either now or in the future. And because cases in which "active supervision" is the deciding issue are likely to be fairly infrequent, states should be able to count on having sufficient time to select procedures appropriate to their own circumstances and to put them in place.

The decision of the Fourth Circuit should be affirmed.

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AMICUS CURIAE BRIEF

No. 13-534

In the Supreme Court of the United States

NORTH CAROLINA STATE BOARD
OF DENTAL EXAMINERS,
Petitioner,

v.

FEDERAL TRADE COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF CALIFORNIA OPTOMETRIC ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether, for purposes of the state-action exemption from federal antitrust law, an official state regulatory board created by state law may properly be treated as a "private" actor simply because, pursuant to state law, a majority of the board's members are also market participants who are elected to their official positions by other market participants.

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THE CALIFORNIA OPTOMETRIC ASSOCIATION'S INTEREST IN THE INSTANT MATTER[1]

The California Optometric Association ("COA") is the statewide optometric association for the State of California, with a membership of over 2,600 optometrists. COA's service to California practitioners spans more than 100 years. During that time, COA has been a leader in advocating for the rights of licensed professionals in the State of California, and a principal force in developing and providing input on relevant legislation and optometric standards of practice, sponsoring educational programs, and issuing professional publications to improve the quality of services provided by the optometric profession.

As one of the largest organizations of associated optometrists in the United States and the primary organization representing the interests of California optometrists, COA has a keen interest in the outcome of these proceedings. A quarter century ago, COA was a party to California State Board of Optometry v. Federal Trade Commission, 910 F.2d 976 (D.C. Cir. 1990), in which the D.C. Circuit held that "state regulation of the practice of optometry is a quintessentially sovereign act." Id. at 982. COA believes that the same sentiment applies in this case,

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[1] No attorney for any party authored this brief in whole or in part, and no person or entity other than the California Optometric Association or its counsel have made a monetary contribution to the preparation or submission of this brief. All parties to this action have given blanket consents to the filing of amicus briefs, which consents are on file with the Clerk of the Supreme Court.

which is why it is submitting this brief in support of the Petitioner.

SUMMARY OF ARGUMENT

Affirmance of the United States Court of Appeals for the Fourth Circuit's decision in this matter would significantly undercut 70 years of "state action" jurisprudence developed since this Court's decision in Parker v. Brown, 317 U.S. 341, 350-351 (1943). Prior to the Fourth Circuit's disposition below, no court had held that a state regulatory board was a "private" actor simply because, under state law, a majority of the board's members were "market participants" elected by other "market participants." Should the Fourth Circuit's decision be affirmed herein, long-held protocols blessed by this and other courts would be set aside in favor of a framework that would gravely threaten the States' ability to regulate licensed professionals within their borders. Neither law nor sound policy supports such an outcome.

ARGUMENT

I. AFFIRMANCE OF THE FOURTH CIRCUIT'S DECISION WOULD FUNDAMENTALLY ALTER THE WAY THAT LICENSED PROFESSIONALS ARE REGULATED

The FTC's attempts to increase its sphere of regulatory influence within and among the various States have been rather like Russia's historical efforts to acquire a warm water port—repeated and persistent. Twenty-five years ago, the FTC promulgated a series of ophthalmic practice rules known as "Eyeglasses II." 54 Fed.Reg. 10,285 (1989). Eyeglasses II revised Title 16,

Part 456 of the Code of Federal Regulations to include a new provision, entitled "State Bans on Commercial Practice." That provision barred state and local governmental entities from implementing or enforcing laws the FTC found to be "unfair," including, *inter alia*, laws that (a) prohibited laypersons from employing optometrists to provide optometric services, (b) limited the number of offices that may be owned or operated by optometrists, and (c) prohibited optometrists from practicing under any name other than their own. Id. at 10,306; see, also, California State Board of Optometry, 910 F.2d at 979.

Following the FTC's promulgation of Eyeglasses II, a group of petitioners, including COA, challenged the FTC's actions on statutory and constitutional grounds. The D.C. Circuit presented the questions under review as including "whether a State acting in its sovereign capacity is a 'person' within the FTC's enforcement jurisdiction under section 5(a) of the [Federal Trade Commission Act]." Ibid.[2] To address and resolve that question, the D.C. Circuit described its charge as first requiring a determination of Congress's intention in promulgating the FTC Act. Ibid. As to that issue, the court quickly concluded that "[t]here is nothing in the language of [the FTC Act] to indicate that Congress intended to authorize the FTC to reach the 'acts or practices' of States acting in their sovereign capacities," and additionally found nothing in the FTC Act's legislative history or otherwise that would alter that conclusion. Id. at 980. Citing the "state action"

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[2] As this Court well knows, that jurisdiction includes the power to prevent "unfair or deceptive acts or practices," as well as unfair methods of competition. 15 U.S.C. § 45(a) (1988).

doctrine enunciated by this Court in Parker v. Brown, 317 U.S. at 350-351,[3] the D.C. Circuit observed that "properly framed, the question before us is not simply whether a State is a person under section 5(a)(2) of the Act, but whether a State acting in its sovereign capacity is subject to the Act." California State Board of Optometry, 910 F.2d at 980. After determining that the state action doctrine does serve to limit the FTC's rulemaking authority (id. at 981), the court answered the question as follows:

> An agency may not exercise authority over States as sovereigns unless that authority has been unambiguously granted to it. When one applies this rule of construction to [the pertinent provisions of the FTC Act], it becomes clear that the FTC had no authority to promulgate Eyeglasses II.
>
> First, state regulation of the practice of optometry is a quintessentially sovereign act. Second, there can be little question that accepting an interpretation of the Act that sanctions [Eyeglasses II] would alter the usual balance between the Federal Government and the States. [Eyeglasses II] subjects States to direct FTC regulation by declaring that certain state laws constitute unfair acts or practices. It thus empowers the FTC directly to "prevent"

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[3] Under that doctrine, when a State acts in a sovereign rather than proprietary capacity, it is exempt from the antitrust laws even though those laws may restrain trade. Ibid.; see, also, City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 391, 408-413 (1978).

> States from imposing certain restrictions on the practice of optometry. *See* 15 U.S.C. § 45(a)(3). Third, nothing in either the language of the Act or its legislative history evidences a congressional intent to alter the state-federal balance as [Eyeglasses II] would As nothing in the language of the Act clearly expresses a congressional intent to empower the FTC to regulate state action, we must reject [Eyeglasses II].

Id. at 982.

The FTC's actions in the present case—which are the product of a decade-long germination period (see, e.g., Brief for Petitioner, at p. 5)—are merely an attempt to achieve the aim rejected in California State Board of Optometry by means of the back door. Indeed, by characterizing the North Carolina State Board of Dental Examiners ("NCSBDE") as a "private" actor rather than a sovereign governmental body, the FTC not only seeks to bypass the analytical framework described above, but significantly hobble the state action doctrine as a whole. In the years since Parker v. Brown, state legislatures have seen fit to assign rulemaking and enforcement authority to dedicated, profession-specific boards and similar agencies, *not* to delegate regulatory responsibility away from "the state," but to ensure that—in an age of ever-increasing specialization—that responsibility is being exercised by those best equipped to do so. In California alone, there are 31 professional boards or commissions governing licensed professionals, from accountants to pharmacists, from court reporters to optometrists. It invokes no unrealistic parade of horribles to suggest

that, were the FTC and Fourth Circuit's novel formulation of "state action" to be accepted by this Court, the States' ability to regulate licensed professionals would be seriously threatened.

To be sure, should the result below be affirmed, States would be given a Hobson's choice between (1) "re-centralizing" regulatory authority in an attempt to avoid the reach of the Court's finding that board-based regulation of licensed professionals is "private" conduct, rather than "state action," or (2) ceding supervisory authority to the FTC and its sister agencies at the federal level. Neither outcome is acceptable. The former would divest the States of the ability to utilize the skills and expertise of "market participants" in regulating licensed professions. The latter would not only "alter the usual constitutional balance between the States and the Federal Government" in absence of any congressional intent to do so (Will v. Michigan Department of State Police, 491 U.S. 58, 64 (1989)), but place that authority in the hands of bodies in an inferior position to review and address the specific concerns faced by each licensed profession within each State. In either case, "[w]ise and efficient federalism calls for no such result." Phillip E. Areeda, Antitrust Law ¶ 212.3b (Supp. 1982), at pp. 56-67.

II. AFFIRMANCE OF THE FOURTH CIRCUIT'S DECISION COULD NOT BE CONFINED TO A LIMITED SCOPE

Nor would the reach of an order affirming the Fourth Circuit's decision be limited to the facts of this case, or to the acts of boards whose authorities or compositions mirror that of the NCSBDE. In that vein,

and in the proceedings below, the FTC attempted to contrast the NCSBDE with other States' boards that have, for instance, (a) less independent rulemaking power, or (b) fewer licensee members, or (c) more members directly appointed by the governor. However, the fact of the matter is that there is not a single case on the books—until now—in which a state agency acting pursuant to state law has been subjected to federal antitrust strictures, *regardless* of whether the agency is a majority licensee board, or elected by market participants, et cetera. Moreover, not only would inventing criteria that distinguishes one state agency from another for purposes of state action immunity be a byzantine and unwieldy task, but one that would practically invite confusion and conflict:

> [T]he real question is whether a jury can tell the difference between municipal-action-not-entirely-independent-because-based-partly-on-agreement-with-private-parties that is *lawful* and municipal-action-not-entirely-independent-because-based-partly-on-agreement-with-private-parties that is *unlawful*. The dissent does not tell us how to put this question coherently, much less how to answer it intelligently.

City of Columbia v. Omni Outdoor Advertising, 499 U.S. 365, 375 n. 5 (1991) (emphasis in original).

The D.C. Circuit in California State Board of Optometry, just like this Court in Parker v. Brown, arrived at the right decision. For federalism as we know it to work, the state action doctrine must be observed in a way which ensures that States' sovereign interests are legitimately and adequately protected.

Were this Court to defer to the Fourth Circuit's construction and uphold the FTC's actions in this matter, it would "short-circuit the protection offered States by the political process." California State Board of Optometry, 910 F.2d at 981. Such a result cannot and should not obtain.

CONCLUSION

For the reasons set forth above and in Petitioner's Brief, COA urges this Court to reverse the judgment of the Fourth Circuit, and to grant the NCSBDE's petition for review of the FTC's final order.

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AMICUS CURIAE BRIEF

No. 13-534

IN THE

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THE NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS,

Petitioner,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE FEDERATION OF STATE BOARDS OF PHYSICAL THERAPY, *ET AL.* AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS AND REVERSAL

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INTERESTS OF THE *AMICI CURIAE*

Each of the organizations that is a party to this *amicus curiae* brief has a special interest in this case because it, or its members, perform regulatory and licensing duties like those of the North Carolina State Dental Board ("Dental Board")[1]:

- The Federation of State Boards of Physical Therapy ("FSBPT") is a not-for-profit federation of the state physical therapy regulatory licensing boards of each of the fifty states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands. FSBPT member boards regulate the safe and lawful practice of physical therapy in their respective jurisdictions.

- The Federation of Associations of Regulatory Boards ("FARB") is a not-for-profit, 501(c)(3) membership association that promotes public protection and provides a forum for beneficial collaboration among its members, associations of regulatory boards across disciplines, jurisdictions, and professions.

- The National Council of State Boards of Nursing ("NCSBN") is a not-for-profit, 501(c)(3) corporation composed of the boards of nursing of all states, the District of Columbia and four United States territories. NCSBN's member boards are the

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1. No party to the instant appeal has authored or contributed money to this brief, nor has anyone other than *amici curiae* and their members contributed to this brief, financially or otherwise. All parties have consented to the filing of this brief.

state agencies responsible for the regulation of registered, practical and vocational nurses throughout the United States and its territories. The NCSBN assists its member boards of nursing to act and counsel together on matters of common interest and concern affecting the public health, safety and welfare, including the development of the national licensing examinations in nursing.

- The National Board of Certification in Occupational Therapy ("NBCOT") is a not-for-profit credentialing agency that promotes public protection by providing a certification process for the occupational therapy profession.

- The American Association of Veterinary State Boards ("AAVSB") is a not-for- profit, 501(c)(3) association that promotes public protection and uniformity by providing programs and services to its membership, which is comprised solely of the 57 veterinary licensing boards in the United States, the District of Columbia, the U.S. Virgin Islands, Puerto Rico and four Canadian provinces.

- The Association of Social Work Boards ("ASWB") is a not-for-profit, 501(c)(3) association that promotes public protection and uniformity by providing programs and services to its membership, which is comprised solely of social work regulatory licensing boards in the United States and Canada.

- The Federation of State Massage Therapy Boards ("FSMTB") is a not-for-profit, 501(c)(3) organization that promotes public protection and uniformity by

providing programs and services to its membership, which is comprised solely of jurisdictional agencies authorized by statute to regulate the practice of massage therapy in the United States.

- The International Conference of Funeral Service Examining Boards, Inc. ("ICFSEB") is a not-for-profit, 501(c)(3) organization that promotes public protection and uniformity by providing programs and services to its membership, which is comprised solely of the jurisdictional agencies authorized by statute to regulate the practice of funeral and embalming services in the United States and Canada.

- The National Association of Long Term Care Administrator Boards ("NAB") is a not-for-profit organization that promotes public protection and uniformity by providing programs and services to its membership, which is comprised solely of the boards which regulate long term care administrators in the United States and District of Columbia.

- The American Association of State Counseling Boards ("AASCB") is a not-for-profit association that promotes public protection and uniformity by providing programs and services to its membership, which is comprised solely of governmental agencies responsible for the licensure and certification of counselors throughout the United States.

- The Association of Regulatory Boards of Optometry ("ARBO") is a not-for-profit, 501(c)(3) organization

that promotes public protection and uniformity by providing programs and services to its membership, which is comprised solely of optometry regulatory boards in the United States, Canada, and Australia.

- The Association of State and Provincial Psychology Boards ("ASPPB") is a not-for-profit association that promotes public protection and uniformity by providing programs and services to its membership, which is comprised solely of the psychology boards in the United States and Canada.

- The National Association of Boards of Pharmacy ("NABP") is a not-for-profit, 501(c)(3) organization that promotes public protection and uniformity by providing programs and services to its membership, which is comprised of boards of pharmacy in the United States, District of Columbia, Guam, U.S. Virgin Islands, Puerto Rico, Australia, New Zealand, and Canada.

- The National Association of State Boards of Accountancy ("NASBA") is a not-for-profit organization that promotes public protection and uniformity by providing programs and services to its membership, which is comprised of boards of accountancy in the United States.

- The National Association of State EMS Officials ("NASEMSO") is a not-for-profit, 501(c)(3) organization that promotes public protection and uniformity by providing programs and services to its membership, which is comprised of state EMS agencies in the United States.

- The Federation of Chiropractic Licensing Boards ("FCLB") is a not-for-profit, 501(c)(3) organization that promotes public protection and uniformity by providing programs and services to its membership, which is comprised of chiropractic regulatory boards in the United States, Canada, Australia, and Mexico.

Like the Dental Board, the member boards of the *amici* parties are tasked with regulating their respective professions for the good of the public and enforcing certain limitations on the practice of their profession, as mandated by their state lawmakers. These boards are frequently composed of professionals who regulate their respective professions. Thus, *amici*'s member boards face the threat of antitrust actions against them if the decision of the Fourth Circuit is permitted to stand, or if the Fourth Circuit's decision is interpreted to define as a private actor any regulatory board comprised of a majority of regulated professionals. *Amici* therefore have an interest in apprising the Court of the consequences of the Fourth Circuit's decision to decline to apply state action immunity to the Dental Board.

Amici focus on the question of whether state regulatory boards are entitled to state action immunity from the federal antitrust laws when the boards include members of the regulated profession. *Amici* are concerned that the Fourth Circuit's test for determining state action immunity could subject *amici*'s boards and their board members to antitrust liability and, thus, destroy the usefulness of state regulatory boards, to the detriment of the professions and to the consuming public.

Many states have enacted statutes establishing regulatory boards that include members of the regulated profession. Such boards rely upon a professional membership with a flexible and strong enforcement power to regulate their profession. The threat of liability could discourage members from passing necessary regulations, enforcing their mandates vigorously, and regulating their professions properly. This decision could thus negatively affect the quality of the boards and the professionals they regulate, as well as the health and safety of the public whom they serve.

SUMMARY OF ARGUMENT

Amici curiae respectfully submit this brief in support of the Petitioner. *Amici* submit that the judgment of the Fourth Circuit was erroneous and should be reversed by this Court. The state action immunity doctrine should apply to actions of state boards like the Dental Board. The Fourth Circuit's decision was erroneous as a matter of law and ill-advised as a matter of policy.

The fundamental purpose of state regulatory boards is to protect the public from harm caused by the unlawful or unsafe practice of the professions they regulate. Accordingly, states invest these boards with mandates to protect against the danger of unlicensed practitioners, ensure minimum standards, and regulate professional conduct. The Fourth Circuit's decision threatens to jeopardize this regulatory process and must be overturned for at least four reasons.

First, the Fourth Circuit's decision threatens to undermine states' ability to delegate functions to their

regulatory boards. This Court has recognized that the Sherman Act was not designed to nullify a state's control over its officers and agents. This Court has also recognized the essential role that state regulatory boards composed of professional members play in the proper administration of state government. The Fourth Circuit's test would force states to restructure their administrative systems to eliminate market participant members from their regulatory boards or impose a duplicative and unnecessary extra layer of supervision over their boards. As a result, the Fourth Circuit's test would destroy the many benefits inherent in delegation to state regulatory boards, while also potentially endangering the public whom these boards are tasked with protecting.

Second, state regulatory boards like the Dental Board are clearly state entities. They possess the public attributes that this Court emphasized in holding that municipalities are not required to meet the active supervision prong of the state action doctrine. Like municipalities, state boards have broad public mandates and are consistently exposed to public scrutiny. Thus, like municipalities, the need for active supervision does not arise.

Third, the Fourth Circuit improperly presumed that state regulatory boards do not act in the public interest and that the Dental Board must not be a state entity. The mere presence of a majority of licensed professionals on a board that regulates a profession does not make that board a private actor, however. The Fourth Circuit presumed that because the individuals comprising a board have private interests, the board pursues those interests. There is no stated basis for this presumption. In fact, just the opposite presumption is preferable. This Court has

applied a presumption that municipalities act in the public interest. This presumption is no less appropriate for state regulatory boards. Like municipalities, state regulatory boards are arms of the state and have open-government laws and other disclosure requirements. The open and public nature of these entities indicates that they have an incentive to act in the public interest and not pursuant to individual private interests.

Fourth, the Fourth Circuit's test improperly looks behind state action to inquire into the private motives of state board members. The Fourth Circuit focused its inquiry on the composition of the Dental Board and the potential private interests of the dentists serving on it. The Fourth Circuit's test is in direct opposition to this Court's clear mandate that courts are not permitted to look behind the actions of states to determine whether they qualify for state action immunity. This mandate is derived from this Court's dual concerns for state sovereignty and federalism. Allowing courts to inquire into the private interests of state actors in determining whether to apply active supervision would necessarily intrude on a state's ability to determine the structure of its administrative systems.

ARGUMENT

I. ACTS TAKEN BY DULY AUTHORIZED STATE REGULATORY BOARDS SHOULD BE IMMUNE FROM FEDERAL ANTITRUST LIABILITY UNDER THE STATE ACTION DOCTRINE.

The state action doctrine immunizes a state from federal antitrust liability when exercising its sovereign

governmental authority. *Parker v. Brown*, 317 U.S. 341, 350-351 (1943). Conduct by a state acting through the legislature is *ipso facto* immune from the antitrust laws. *Hoover v. Ronwin*, 466 U.S. 558, 567-568 (1984). In such a case, states are granted immunity not because they have chosen to act anticompetitively, but rather, because the state has chosen to act at all. *Id.* at 574. This Court has justified this doctrine based on federalism and state sovereignty rationales:

> "In a dual system of government, in which, under the Constitution the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not to be lightly attributed to Congress."

Parker, 317 U.S. at 351.

The doctrine does not apply directly to sub-state entities or private actors because such actors are not themselves sovereign. However, such entities may receive the protection of the doctrine where their actions are authorized implementations of state policy. *See Federal Trade Commission v. Phoebe Putney Health System*, 133 S.Ct. 1003, 1010 (2013); *City of Columbia v Omni*, 499 U.S. 365, 370 (1991); *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985); *Hass v. Oregon State Bar*, 883 F.2d 1453 (9th Cir. 1989); *Earles v. State Board of Certified Public Accountants*, 139 F.3d 1033 (5th Cir. 1998).

The application of state action immunity to private and sub-state actors differs depending on the type of

entity at issue. If the actor is a private actor then it must satisfy two prongs to gain the benefit of state action immunity. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97 (1980). First, it must show that there is a clearly articulated state policy to displace competition. Second, it must show that there is active supervision by the state of the conduct at issue. If the actor is instead a municipality, it must show only that there is a clearly articulated policy to displace competition. Unlike private actors, municipalities are not required to show that their activity is actively supervised by the state. *Town of Hallie*, 471 U.S. at 46. Importantly, this Court has also suggested that sub-state entities, including state boards and agencies, are also not required to meet the active supervision requirement. *Id.* at 46 n.10 ("In cases in which the actor is a state agency, it is likely that active supervision would also not be required").

A. The Fourth Circuit's test imperils states' ability to delegate their authority to expert regulatory boards and undermines those boards' ability to regulate in accordance with their public mandates.

The state action doctrine protects a state's ability to delegate its authority to sub-state entities. *Town of Hallie*, 471 U.S. at 38. In developing the state action doctrine, this Court has stressed that the Sherman Act was not intended to "nullify a state's control over its officers and agents." *Id.* at 38. This Court has recognized that regulatory boards play an essential role in the efficient operation of state governments and in the protection of the public. *See Southern Motors Rate Conf. v. United States*, 471 U.S. 48, 64 (1985) (explaining that "[a]gencies are created because

they are able to deal with problems unforeseeable to, or outside the competence of the legislature").

States create regulatory boards to serve important public interests, including the protection of the public health. *Gambrel v. Kentucky Board of Dentistry*, 689 F.2d 612, 618 (6th Cir. 1981) (describing Kentucky's regulatory interest in restricting certain activities to licensed dentists, "a matter which is of vital interest to the health and safety of citizens"). Professional regulatory boards guard against unlicensed and unqualified practitioners in a variety of professions. *See e.g., Semler v. Oregon State Bd. of Dental Exam'rs*, 294 U.S. 608 (1935) (finding that that Legislature was dealing "with the vital interest of public health" and that the public is concerned with the "maintenance of professional standards"). Professional boards ensure consistent standards of quality and exclude individuals who cannot meet those standards from practice.

States structure their regulatory boards carefully to achieve those important public interests. To this end, regulatory boards often include market participant members because market participants are typically in a better position than lay people to examine the highly technical matters that these boards regulate. States recognize that experts are often better equipped to authorize and regulate their professions than are non-members of the profession. *See Cal. Dental Ass'n v. FTC*, 526 U.S 756, 772 (1999) (recognizing the specialized knowledge to evaluate medical services); *Southern Motors Rate Conf. v. United States*, 471 U.S. 48, 64 (1985) (noting that states create agencies because they are often better equipped to deal with unforeseeable issues). States intend that board members will apply their expertise to technical

problems, which lay persons do not have the specialized knowledge to address. *Cal. Dental Ass'n*, 526 U.S. at 772 (citing the "common view that the 'lay public is incapable of adequately evaluating the quality of medical services'").

Under one reasonable interpretation of the Fourth Circuit's ruling, a state board made up of a majority of market participants (no matter how selected) would not qualify as a state entity and thus would be required to show active supervision to obtain state action immunity. *See The North Carolina State Board of Dental Examiners v. Federal Trade Commission*, 717 F.3d 359, 368 (2013) ("We agree with the FTC that state agencies '"in which a decisive coalition (usually a majority) is made up of participants in the regulated market,"' who are chosen by and accountable to their fellow market participants, are private actors and must meet both *Midcal* prongs"). Such a test would destroy states' ability to structure their regulatory boards with a majority of individuals who work in the profession they regulate. To obtain the mere possibility of state action immunity, states would be required to either restructure their boards to include a majority of non-market participants or actively supervise their boards in some undefined way. As a result, the Fourth Circuit's test would undermine the very purposes of delegation to expert regulatory boards.

Without state action immunity, board members would operate under the constant threat of antitrust liability. This Court has recognized this concern and noted that if state action immunity is easily avoided then antitrust litigation may have a discouraging effect on public service. *See Hoover v. Ronwin*, 466 U.S. 558, 580 n.34 (1984) ("the threat of being sued for damages . . . will deter [individuals] from performing this essential public service"). Without

the certainty of state action immunity, many professionals may be reluctant to serve on regulatory boards for fear of incurring liability. *See id.* at 580 n.34. Individuals who do serve may be reluctant to or unable to make controversial decisions or pass regulations necessary to regulate their professions effectively. Professional regulatory boards depend on having strong enforcement powers to oversee their members and ensure quality and safety. The threat of liability would negatively affect the quality of oversight these boards provide and, as a result, the quality of the professionals who are licensed. Consequently, the absence of effective enforcement would imperil the public whom these boards are often tasked with protecting. For example, board members might be reluctant to enforce claims of malpractice or impose discipline upon a licensed professional where such enforcement could lead to antitrust liability. This would allow unqualified and potentially dangerous practitioners to continue providing services to the public, thus exposing the public to new and serious risks.

States also create regulatory boards to avoid micromanagement. Delegation to regulatory boards allows states to achieve important efficiency benefits. States have neither the resources nor the ability to regulate all segments of the state effectively. Thus, states delegate functions to state boards and expect that those expert boards will regulate those segments in accordance with their mandates. Without regulatory boards, states would necessarily be involved in every detail of state regulation. For example, without regulatory boards states would be required to design complex professional certification examinations and craft technical medical regulations on their own. Boards allow states the ability to delegate these details to a group of experts.

Finding such boards to be private actors requiring active supervision would eviscerate the rationale for having a board of professionals. Active supervision would impose a duplicative, unnecessary, and potentially time-consuming extra layer of review over these boards by non-experts. In short, it would require states to micromanage the very boards to which they have chosen to delegate authority. As this Court has observed, requiring "express authorization of every action that an agency might find necessary to effectuate state policy would diminish if not destroy, [a board's] usefulness." *See Southern Motors Rate Conf.*, 471 U.S. at 64. Lay supervision of these highly technical boards would diminish the effectiveness of the regulatory regime and imperil the public whose health and safety these boards are tasked with protecting. There is no reason to believe that an additional layer of supervision overseen by lay persons would improve the decision making of these boards. Rather, without technical expertise, such lay persons must rely on the counsel of the market participant board members anyway. Absent such reliance, decisions made by lay members could imperil the health and the well-being of the public. Those lay members who would ignore the conclusions of the expert board would make medical, dental, or other highly technical judgments without the benefit of expert guidance. Thus, in effect, any active supervision of these boards would either be entirely duplicative or, more seriously, pose a significant risk to the public.

The Fourth Circuit's test is simply not a workable objective standard for state boards to follow. Instead, it puts boards in a state of constant uncertainty regarding their legality. The Fourth Circuit's ruling seems to hold that there are too many privately interested professionals

on the Dental Board to be a state entity. *The N.C. State Board of Dental Examiners*, 717 F.3d at 368. Thus, any board composed of market participants would be vulnerable to the charge that it is actually a private actor requiring active supervision. The Fourth Circuit does not clearly explain, however, how a state might structure its regulatory boards to avoid active supervision. Instead, the Fourth Circuit merely notes that active supervision might not be required for boards that are more "quintessential" state agencies, without explaining how a regulatory board might rise to such "quintessential" status. *Id.* at 367 n.4. Moreover, what the Fourth Circuit does not acknowledge is that state boards are almost always dominated by market participants. *See e.g., Hass*, 883 F.2d 1453 (twelve of fifteen members of the board were professionals); *Earles*, 139 F.3d 1033 (entire board was composed of professionals). As discussed *supra*, the reasons for this are manifold, but generally states have determined that the effective administration of regulatory boards *requires* that they include interested members. *See Hoover v. Ronwin*, 466 U.S. 558, 580 (1984) (recognizing that state committees, commissions, and others "*necessarily must advise the sovereign*") (emphasis added). Thus, any test that hinges the application of active supervision on the membership structure of a state board is simply unworkable and destroys a state's ability to delegate functions to these boards.

Although the Fourth Circuit's decision appears to have articulated a test that hinges the application of active supervision upon whether a regulatory board contains a majority of market participants, *See The N.C. State Board of Dental Examiners*, 717 F.3d at 368, the concurring opinion suggested that the critical feature was not the

ratio of professionals on the board, but rather the means by which Dental Board members were selected—election by other licensed professionals, as opposed to selection by the state government.[2] *Id.* at 376. The specific parameters of the Fourth Circuit's test for state action immunity are therefore unclear. To the extent this Court concludes that the Dental Board should be treated as a private actor solely because of the method by which its members were selected, *amici* respectfully urge this Court to expressly so state, so as to construe the Fourth Circuit's ruling narrowly and to provide clearer guidance regarding the permissible role of licensed professionals on regulatory boards.

B. State regulatory boards are clearly state entities and possess the attributes that this Court has emphasized in holding that municipalities do not need to meet the active supervision test.

State regulatory boards are state entities. They possess the public attributes that this Court recognized in *Town of Hallie*, holding that a municipality was not required to show active supervision. *See Town of Hallie*, 471 U.S. at 45-47. This Court acknowledged that, unlike private actors, a municipality's conduct was likely to be exposed to public scrutiny and was checked to some degree through the electoral process. *Id.* at 45 n.9.

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2. Although *amici* do not endorse selection of board members via election by licensed professionals, the delegation of state functions to licensed professionals serves a vital role in state regulation, and this Court's precedent makes clear that it is not a proper role of the federal government to second guess the means by which the States opt to structure their regulatory boards.

These characteristics provided the Court comfort that "there is little or no danger that [the entity] is involved in a private price fixing arrangement." *Id.* at 47. This Court has used the clear articulation prong of the *Midcal* test alone to guard against anticompetitive behavior by state, municipality, and sub-state entities. *See e.g., id.* at 47; *Federal Trade Commission v. Phoebe Putney*, 133 S.Ct. 1003, 1016 (2013). For these types of entities, clear articulation provides sufficient protection against anticompetitive behavior. For example, in *Goldfarb v. Virginia State Bar*, this Court held that a state bar association made up of market participants did not qualify for state action immunity "because it [could not] fairly be said that the State of Virginia through its Supreme Court Rules required [the Bar's] anticompetitive activities." 41 U.S. 773, 790 (1975). In other words, this Court held that Virginia had not clearly articulated a policy to displace competition. *See Phoebe Putney*, 133 S.Ct. at 1016 ("[I]n Goldfarb v. Virginia State Bar... we found no evidence that it had adopted a policy to displace price competition among lawyers"). Although the FTC and Fourth Circuit have both relied on *Goldfarb*, *Goldfarb* is a case that turned exclusively on the absence of clear articulation not on active supervision, which this Court did not apply. The reasoning behind this Court's application of active supervision to municipalities and other sub-state entities is as compelling if not more so when applied to state regulatory boards.

State boards similarly have broad public mandates and rules designed to protect the legitimacy and integrity of their processes. In the immediate case for example, North Carolina defines the Dental Board as a public entity. N.C. Gen. Stat. § 90-22(b). The Dental Board is established

by action of the state legislature—not by decree of a medical society or other private entity. N.C. Gen. Stat. 90-22(b). The state has expressly designated the Dental Board as the agent through which the state will regulate the practice of dentistry. *Id.* (describing it as "an agency of the State for the regulation of the practice of dentistry in this state"). The Dental Act's very purpose is to protect the public interest. N.C. Gen. Stat. § 90-22 (declaring the practice of dentistry "to affect the public health, safety, and welfare and to be subject to regulation and control in the public interest").

Unlike private actors, and like municipalities, state boards are consistently exposed to public scrutiny. For example, in the immediate case, as a state agency, the Dental Board is subject to open-government laws and strict ethics rules. The Dental Board's records are open for public inspection, N.C. Gen. Stat. § 90-41(g), and its accounts and financial affairs are subject to periodic audits by the state auditor. N.C. Gen. Stat. §§ 93B-4; 147-64.1 – 147-64.14. It is required to give public notice of its meetings, which must be open to the public. N.C. Gen. Stat. § 143-318.9 – 143-318.18. Any rules passed by the Dental Board must be reviewed and approved by the Legislature's Rules Review Commission. N.C. Gen. Stat. §143B30.1 – 143B-30.4. Board members are sworn to protect the public and required by statute to avoid conflicts of interest. N.C. Gen. Stat §§ 138A-2; 138A-22(a). Board members are public officials who must comply with a code of ethics. N.C. Gen. Stat. § 138A-1 – 138A-45. Lastly, and directly relevant to the Fourth Circuit's rationale, as a state agency, members of the Dental Board are expressly forbidden from using their board membership for private gain. N.C. Gen. Stat. §§ 138A-31, 138A-34, 138A-45(g).

The courts that have ruled on this issue have adopted the reasoning of *Town of Hallie* and noted the public characteristics of state boards. *See e.g., Hass v. Oregon State Bar*, 883 F.2d 1453 (9th Cir. 1989); *Earles v. State Board of Certified Public Accountants*, 139 F.3d 1033 (5th Cir. 1998); *Porter Testing Laboratory v. Board of Regents for Oklahoma Agricultural & Mechanical Colleges*, 993 F.2d 768 (10th Cir. 1993). In *Hass*, the Ninth Circuit held that a State Bar Association was not subject to active supervision even though twelve of the fifteen members of the Board were practicing attorneys who were elected by other lawyers in the state. 883 F.2d at 1460. The court held that the state bar association had attributes similar to those noted by this Court in *Town of Hallie* and noted that the Bar Association was a "public corporation" and an "instrumentality of the judicial department." *Id.* at 1455. The Bar Association was also "the agency of the state of Oregon organized to regulate the practice of law for the benefit of the public." *Id.* at 1460. The court acknowledged several characteristics that exposed the Bar Association to public scrutiny including that its records were open to public inspection, its accounts subject to periodic audit, its meetings open to the public, and its members subject to ethics rules. *Id.* at 1460. These characteristics, the court held, left "no doubt that the Bar is a public body, akin to a municipality for the purposes of the state action exemption." *Id.* at 1460.

Similarly, in *Earles*, the Fifth Circuit held that a State Board of Certified Public Accountants was not subject to active supervision even though the Board was "composed entirely of CPAs who compete in the profession they regulate." 139 F.3d at 1041. The court held that the CPA Board was functionally similar to a municipality because

of the "public nature of the Board's actions." *Id.* at 1041. In the immediate case, the Dental Board exhibits those public characteristics that the courts in both *Earles* and *Hass* emphasized in finding those boards public entities. As were the boards in *Hass* and *Earles*, and as are a multitude of regulatory boards across states and professions in this country, the Dental Board is clearly a public entity.

C. The mere presence of a majority of licensed professionals on a board that regulates that profession does not make that board a "private" actor.

The Fourth Circuit improperly applied a presumption that board members are motivated by self interest and, thus, the Board must not be a state entity. *See The N.C State Board of Dental Examiners*, 717 F.3d at 369 ("[W]hen a state agency appears to have the attributes of a private actor and is taking actions to benefit its own membership . . . both parts of *Midcal* must be satisfied"). Any test that would deem a state entity private simply because, pursuant to state law, a majority of the board's members are also market participants, improperly presumes that a state entity is motivated by self-interest. Unlike private actors, however, state regulatory boards should be presumed to be acting in furtherance of their state mandated missions. This is consistent with this Court's treatment of municipalities. *See Town of Hallie*, 471 U.S. at 45.

This Court has applied a presumption that municipalities act in the public interest. *Town of Hallie*, 471 U.S. at 45. In *Town of Hallie*, this Court did not hold that courts should engage in a case-by-case analysis to determine whether individual municipalities are entitled

to such a presumption, but simply declared that because a municipality is an arm of the state it may be presumed to be acting in the public interest. *Id.* at 45. To justify this presumption, this Court emphasized the open-government laws and other disclosure requirements that make a municipality "more likely to be exposed to public scrutiny than is private conduct." *Id.* at 45-47.

This presumption is no less appropriate for state regulatory boards. Like municipalities, state regulatory boards are arms of the state. Also like municipalities, regulatory boards are organized for the benefit of the public and not the benefit of business participants. For example, The North Carolina Dental Act's express purpose is to protect the public interest. N.C. Gen. Stat. § 90-22 (declaring the practice of dentistry "to affect the public health, safety, and welfare and to be subject to regulation and control in the public interest"). To that end, the Dental Board has been designated as the agency of the state that will regulate dentistry. N.C. Gen. Stat. § 90-22(b).

In light of *Town of Hallie*, courts have held that other sub-state entities should also be presumed to be acting in the public interest. For example, in *Cine 42nd St. Theater Corp. v. Nederlander Organization, Inc.*, the Second Circuit held that a public development corporation must be presumed to be publicly interested because it was "by statute a political subdivision of the state," thus, "its interests must be defined as public rather than private." 790 F.2d 1032, 1047 (2d Cir. 1986).

The Fourth's Circuit's holding requires a dubitable presumption. It does not necessarily follow that because individual board members are private actors, the board

itself will act in the private interest rather than in the public interest. In order to reach that conclusion, it would have to be presumed that the individual board members have a unity of private interests or that the board can accommodate each individual's disparate, private interest. Both seem unlikely. In fact, even if each individual board member acted pursuant to his or her private interest, it is at least as likely that *the board* behaves in the public interest. Indeed, it is more likely that individual board members behave, as board members, in the public interest than in their private interest. As discussed *supra*, state regulatory boards have a variety of open-government and other public disclosure requirements that consistently expose board members to the public eye. This openness indicates that the individuals and the board as a whole are more likely to behave in the public interest than in pursuit of private interests, as might be the case if, instead, they acted behind closed doors.

Indeed, even if the Fourth Circuit was correct to apply a presumption that market participant board members are motivated by self-interest, such private interests do not make the actor a private actor. As discussed *infra*, this Court has held that a court may not deem state action private action by virtue of the private interests of the members of a state entity. *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 375 (1991). And, as a corollary to this rule, a court cannot deem a state actor a private actor due the presence of private interests of the board members. Deeming a state board a private actor by virtue of the private interests of its members improperly looks behind state action in opposition to this Court's clear holding in *City of Columbia v. Omni*. *See id.* at 370.

D. Under this Court's decision in *City of Columbia v. Omni*, it is improper for a federal court to examine the makeup and character of a state board in order to challenge the board's status as a state actor.

The Fourth Circuit's test for active supervision improperly looks behind the actions of state entities to determine whether they are motivated by private interests. *See The North Carolina State Board of Dental Examiners v. Federal Trade Commission*, 717 F.3d 359, 369 (2013) ("[W]hen a state agency appears to have the attributes of a private actor and is taking actions to benefit its own membership both parts of *Midcal* must be satisfied"). The Fourth Circuit's focus on private interests is in direct opposition to this Court's clear mandate that courts are not permitted to examine governmental actions for perceived conspiracies, deconstruct the governmental process, or probe the official "intent" to determine if the process has been usurped by private entities. *City of Columbia*, 499 U.S. at 370. Under the *City of Columbia*'s mandate, an official state regulatory board created by state law may not be treated as a "private" actor simply because of the method and means by which the state chooses to construct the board.

This Court has rejected any interpretation of the Sherman Act that would allow courts to second guess the actions of a state to determine whether an action is "state action enough." *See City of Columbia*, 499 U.S. at 379. The only relevant inquiry is whether the state has chosen to act, not how it has chosen to act. *City of Columbia*, 499 U.S. at 379. A court may not "deem" public action private action to escape the application of the state action doctrine.

Id. at 375. Judicial tests for state action that inquire into the private motives of an entity or that presume the existence of private motives based on an entity's structure are tests that inherently look behind the actions of the entity. *See e.g., City of Columbia*, 499 U.S. at 378, 383 ("[I]t [is] impracticable or beyond the purpose of the antitrust laws to identify and invalidate lawmaking that has been selfishly motivated by agreement with private interests").

This Court has made clear that courts need not, indeed must not, start down the slippery slope of evaluating motives of state entities. *City of Columbia*, 499 U.S. at 378 ("[W]here the action complained of . . . was that of the State itself, the action is exempt from anti-trust liability regardless of the State's motives in taking the action") (quoting *Hoover v. Ronwin*, 466 U.S. 558, 580 (1984)). In *City of Columbia*, this Court found that even a conspiracy between private actors and government officials could not abrogate state action. 499 U.S. at 379. Inquiry into the quality of the decision making, whether because of conspiracy, fraud, or private interest, is simply not relevant in determining whether state action immunity applies. *Id.*

The prohibition against questioning the actions of state actors applies equally to a court's determination of whether to require active supervision. As the Ninth Circuit has recognized, a court's determination of whether to apply active supervision cannot and must not hinge on the alleged private interests of state actors:

> The allegations of illegitimate motive are not relevant to the application of *Parker* immunity.

> Having acknowledged that the [entity] is a "public entity" [the plaintiff's] argument that the district has improperly abandoned the public interest *is not a basis to impose the active supervision requirement.*

Hedgecock v. Blackwell, 52 F.3d 333 (9th Cir. 1995) (emphasis added).

It would be a curious thing to prohibit a court from inquiring into the private motives of a state entity as was done in *City of Columbia* when a conspiracy was alleged, but to then allow a court to inquire into private motives to determine whether active supervision applies. This would allow courts and plaintiffs to circumvent the clear mandate from *City of Columbia*. Such a test would allow plaintiffs to claim that a variety of entities are private because of their composition, even if these entities have been created by state legislatures. This analysis would leave the rule in *City of Columbia* hollow and would subject a multitude of state boards around the country to potential antitrust liability. Plaintiffs could simply claim that they were addressing not whether the action of an entity was state action, but whether the entity was a state actor at all. Thus, such a rule would allow courts to inquire freely into the motives and incentives of state officials or at the very least use the composition of a state entity as a proxy for inquiring into such motives.

In this case, the Fourth Circuit, by focusing its inquiry on the composition of the Dental Board and its alleged private motives, is attempting to do exactly what this Court prohibited plaintiffs from doing in *City of Columbia*. The Fourth Circuit tested for the application of state

action by inquiring into the private motives of the Dental Board. The Fourth Circuit held that state agencies that have "the attributes of a private actor and [are] taking actions to benefit [their] own membership" must meet both prongs of *Midcal* because in such a situation the state actor is actually a "private actor." *N.C. State Board of Dental Examiners*, 717 F.3d at 369. In *City of Columbia*, this Court rebuffed similar logic, finding that government action cannot be deemed private when taken pursuant to a private interest. 499 U.S. at 375. This Court reasoned that, "[s]ince it is both inevitable and desirable that public officials often agree to do what one or another group of private citizens urges upon them, such an exception would virtually swallow up the *Parker* rule." *Id.* at 375.

Note that in neither *City of Columbia* nor *Town of Hallie* did this Court suggest that possible private motives should be examined, with the possible result that the state entity might instead be found to be a private entity. In fact, this Court has noted in other cases that municipalities are largely free to make economic choices "counseled solely by their own parochial interests." *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 408 (1977). *City of Columbia* is especially instructive because the alleged conspiracy presented a real danger that, in concert with the local company, the municipality was furthering a private price fixing arrangement. Thus, any test that hinges application of state action immunity on the potential for private interests simply cannot be reconciled with *Town of Hallie* or *City of Columbia*.

As this Court has observed, all actions taken by a state entity are vulnerable to the accusation that they are not in the public interest and were done pursuant

to private interests. *City of Columbia*, 499 U.S. at 375. Judicial tests focused on determining whether an actor is actually a state actor based on these private interests would be impractical and would require courts to engage in subjective evaluations of state entities whenever an entity raised state action as a defense.

Additionally, this Court has emphasized that the prohibition against examining the basis and motivations for state actions is based in large measure on the state action doctrine's dual concerns for federalism and state sovereignty. *See City of Columbia*, 499 U.S. at 374 (holding that "in light of our national commitment to federalism, the general language of the Sherman Act should not be interpreted to prohibit anticompetitive actions by the States in their governmental capacities as sovereign regulators"); *see also id.* at 372 ("[I]n order to prevent *Parker* from undermining the very interests of federalism it is designed to protect..."). This Court has cautioned that if a state entity's decision to regulate "is made subject to ex post facto judicial assessment . . . with personal liability of [public officials] a possible consequence, we will have gone far to compromise the States' ability to regulate their domestic commerce." *City of Columbia*, 499 U.S. at 377.

Federalism requires deference to the decision making of states, even where faulty. *See City of Columbia*, 499 U.S. at 373. Thus, the state action doctrine is designed to protect the result of the state's political process even if that result is fundamentally at odds with federal antitrust policy. *See Surgical Care Ctr. v. Hospital Serv. Dist. No. 1*, 153 F.3d 220 (5th Cir. 1998) (holding that *Parker* "commands judicial deference to regulatory schemes enacted by state legislatures, notwithstanding a court's views on

the economic wisdom of the challenged regulation"). As this Court has emphasized, allowing courts to look behind governmental actions would "emasculate" the *Parker* doctrine because it would allow "[P]laintiffs to look behind the actions of state sovereigns and base their claims on perceived conspiracies to restrain trade among the committees, commissions, or others *who necessarily must advise the sovereign*." *Hoover v. Ronwin*, 466 U.S. 558, 580 (1984) (emphasis added).

The Fourth Circuit's ruling tested for application of active supervision by inquiring into the structure of the entity, while ignoring the formalities of state law. The Fourth Circuit's ruling further disregarded the fact that the Dental Board has been designated as a state agency. Federalism, however, demands that courts respect the formalities of state law in determining whether a regulatory body is a state entity. Otherwise federal courts would necessarily become impermissibly involved in structuring state administrative systems. Federal courts would, in effect, have the authority to delineate the proper administrative structure for states. This is a job that courts are ill-equipped to do and should avoid.

CONCLUSION

For the reasons set forth above, the Court should hold that an official state regulatory board created by state law may not be properly treated as a "private" actor simply because, pursuant to state law, a majority of the board's members are also market participants. If the Court does find for the Respondent, *amici* request that the Court provide guidance on how state boards can be legally structured to preserve their status as state entities.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 13-534

In The Supreme Court of the United States

THE NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF LEGALZOOM.COM, INC., RESPONSIVE LAW, FILERIGHT LLC, JUSTANSWER LLC, JUSTIA COMPANY, SHAKE, INC., AND LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Alternative Service Provider *Amici*

LegalZoom.com, Inc. provides affordable online legal solutions for individuals and small businesses. LegalZoom has helped over two million Americans create their own legal documents addressing a variety of routine legal matters. LegalZoom has been subject to anticompetitive actions taken by self- and financially-interested regulatory agencies controlled by private market participants that have threatened to restrict the market choices available to consumers.

Consumers for a Responsive Legal System (Responsive Law) is a non-profit organization that seeks to make the legal system more affordable, accessible and accountable by educating consumers, improving access to online legal resources, championing innovative lawyers and promoting alternative legal services.

FileRight, LLC operates a website located at www.fileright.com where it provides an online platform for consumers to create their own immigration documents.

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[1] The accompanying brief was not written in whole or in part by counsel for any party, and no persons other than *amici* have made any monetary contribution to the preparation or submission of this brief. The parties have blanket consents on file for the filing of *amicus* briefs. The law professors' institutional affiliations are provided for identification purposes only, and imply no endorsement of the views expressed herein by any of the institutions or organizations listed.

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Shake, Inc. operates a website at www.shakelaw.com where it provides a technology platform making the law accessible, understandable and affordable for consumers and small businesses.

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SUMMARY OF ARGUMENT

These *amici curiae* comprise alternative legal information and service providers and a group of prominent law professors who research, analyze and teach about access to justice and the market for legal services. These *amici* strongly believe that the Fourth Circuit's ruling below was correct, and that Petitioner and its allied *amici*'s effort to undermine this Court's precedents that subject state agencies to antitrust scrutiny when they are controlled by private market participants is misguided.

There is an ongoing and worsening access-to-justice crisis in the United States. Increasing numbers of low- and middle-income Americans simply cannot afford to hire lawyers to address legal issues they routinely face. This access crisis is caused, in large part, by over-regulation of the legal market and unnecessarily high and complex barriers to entry. Bar associations, similar to the dental board Petitioner here, are often run by active participants in the very market they are empowered to regulate and control, without meaningful state policy direction or active oversight. As a result, individuals, families, entrepreneurs and small businesses lack access to legal information, resources and assistance.

The research of *amici* law professors and the real-world experience of *amici* market participants provide useful insight to this Court's evaluation of why antitrust oversight remains necessary to deter

the use of state authority to regulate and control markets in self-interested ways.

The first section of this brief outlines the contours of how restricted access to legal services is harming American citizens and businesses. The second section provides illuminating anecdotes of how some state bar associations and their committees have used state-granted enforcement authority to restrict perceived competition with their members, in ways that defy judicial review and are inconsistent with basic due process checks and balances. The final section explains that continued antitrust oversight of financially self-interested parties' enforcement of their members' legal monopoly does not threaten their ability to assure ethical and competent behavior by their members.

ARGUMENT

I. PETITIONER'S EFFORT TO UNDO THIS COURT'S PRECEDENTS HOLDING THAT STATE AGENCIES CONTROLLED BY FINANCIALLY SELF-INTERESTED PARTIES ARE PRIVATE ACTORS SUBJECT TO ANTITRUST OVERSIGHT THREATENS ACCESS TO AFFORDABLE LEGAL SERVICES.

A. Anticompetitive use of state bar regulatory authority is causing substantial harm to consumers and plays a major role in the American crisis of access to justice.

The World Justice Project reports that the U.S. is currently tied with Kyrgyzstan, Mongolia and Uganda in terms of the affordability and accessibility of its civil justice system.[2] As leaders in the American judiciary have recognized (and no reasonable observer disputes), the U.S. faces a crisis in access to justice.[3] For instance, in New York, over 90% of people involved in housing, family, and consumer problems are

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[2] World Justice Project, *Rule of Law Index 2014*, http://worldjusticeproject.org/sites/files/files/wjp_rule_of_law_index_2014_report.pdf (2014).

[3] *E.g.*, Jonathan Lippman, *State Courts: Enabling Access*, DÆDALUS at 28, Summer 2014; Wallace B. Jefferson, Chief Justice of the Supreme Court of Texas, *Liberty and Justice for Some: How the Legal System Falls Short in Protecting Basic Rights*, 19th Annual Justice William J. Brennan Lecture on State Courts and Social Justice, Address at N.Y.U. School of Law (Feb. 27, 2013).

forced to appear in court without legal representation.[4] Studies in other states generally find that the proportion of unrepresented individuals exceeds 80%.[5]

At hourly rates that do not dip much below $200 and which routinely exceed $300, few average Americans can afford to pay lawyers for assistance with everyday legal needs, such as simple estate planning, obtaining elder care, arranging child custody, obtaining child support, addressing consumer debt and foreclosure, managing disputes over employment conditions or pay, and obtaining entitlements to health care, education and public services.[6]

Surveys of legal needs of low- and moderate-income Americans find that roughly 50%-60% of households faced an average of two significant legal problems in the previous year. Lack of access to legal representation leads Americans to take no action to address their legal problems at rates much higher than in countries such as England and the Netherlands

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[4] Jefferson, *Liberty and Justice for Some*.

[5] Gillian K. Hadfield & Jamie Heine, *Life in the Law-Thick World: The Legal Resource Landscape for Ordinary Americans*, in BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE FOR AMERICANS OF AVERAGE MEANS, S. Estreicher and J. Radice (eds.) (forthcoming 2015).

[6] Deborah L. Rhode, ACCESS TO JUSTICE (2005); Gillian K. Hadfield, *The Cost of Law: Promoting Access to Justice through the (Un)Corporate Practice of Law*, 38 INT'L. REV. L. & ECON. 43 (2014); Gillian K. Hadfield, *Innovating to Improve Access: Changing the Way Courts Regulate Legal Markets*, DÆDALUS (forthcoming 2014).

that impose fewer restrictions on who may provide legal advice and assistance: roughly 25%-30% compared with 5%-10%.[7] Shockingly, the number of Americans obtaining help from a lawyer appears to be falling: a 1995 ABA study found that 29% of the poor and 39% of those of moderate means facing a serious legal problem had help from a lawyer or other legal service provider, but surveys conducted in the past ten years found that those percentages have dropped to about 15%.[8] Conservative estimates based on census data indicate that households facing legal problems in 2012 purchased an average of only one and half hours of lawyer services per problem; this is less than half of the amount purchased in 1990.[9] These numbers are only the tip of the iceberg, as they represent erupted legal problems such as a child custody fight, foreclosure, eviction or bankruptcy. Beneath the surface lies a great need for legal help that might prevent or minimize these crises before they erupt.[10]

Small businesses and entrepreneurs – the biggest drivers of new employment – also face enormous hurdles in obtaining affordable legal services. They

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[7] Gillian K. Hadfield & Jamie Heine, *Life in the Law-Thick World: The Legal Resource Landscape for Ordinary Americans*, in BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE FOR AMERICANS OF AVERAGE MEANS, S. Estreicher and J. Radice (eds.) (forthcoming 2015).

[8] *Id.*

[9] *Id.*

[10] *Id.*

form business entities, file for trademarks and patents, take on debt or equity investments, determine their regulatory obligations, file taxes and manage contracts with customers, suppliers, franchisors and the public. A 2012 survey found that nearly 60% of small businesses had faced serious legal problems in the preceding two years – collections, contract review, supplier disputes, security breaches, products liability, employee theft, tax audits, employee confidentiality issues, threats of customer lawsuits, etc.[11] Close to 60% of small businesses faced these problems without lawyer assistance.[12] For those that did hire lawyers, the average expenditure was $7,600 – an enormous cost for a small business.[13]

This crisis in access to justice has many causes, including the complexity of American legal process, cuts to court budgets and limited legal aid funds. But a significant factor is the high price of legal services, and the excessive degree of regulation of U.S. legal markets contributes substantially to those high prices.[14]

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[11] LegalShield, *Decision Analyst Survey: The Legal Needs of Small Business* (2013), http://www.legalshield.com/about-us/pressmedia-kit/the-legal-needs-of-small-business/.

[12] *Id.*

[13] *Id.*

[14] Gillian K. Hadfield, *The Cost of Law: Promoting Access to Justice through the (Un)Corporate Practice of Law*, 38 INT'L REV. L. & ECON. 43 (2014); Laurel A. Rigertas, *The Legal Profession's*

(Continued on following page)

Although some access-reducing restrictions result from rules adopted by state legislatures and supreme courts, others result from the actions of state bar associations. Like Petitioner North Carolina State Board of Dental Examiners, many state bar associations (including *amici* bar associations appearing here) are controlled by active practitioners who may have a direct financial self-interest in maintaining restrictions on who can practice law and how they can do so, and in defining the scope of that monopoly broadly. Like Petitioner, state bar associations routinely operate without active state supervision and may seek to limit competition from alternative legal services providers. A recent survey of state bar unauthorized practice committees and enforcement agencies found that most complaints about alleged unauthorized practice of law (UPL) are made by lawyers or the bar association itself, not by consumers.[15] Nearly 70% of those surveyed could not recall a single instance of serious injury to the public from alleged unauthorized practice in the previous year.[16] The vast majority of complaints never result in court proceedings where enforcement actions can be supervised by state court judges – rather, they are resolved unofficially through bar and committee investigations,

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Monopoly: Failing to Protect Consumers, 82 FORDHAM L. REV. 2683 (2014).

[15] Deborah L. Rhode & Lucy Buford Ricca, *Protecting the Profession or the Public? Rethinking Unauthorized-Practice Enforcement*, 82 FORDHAM L. REV. 2587 (2013-14).

[16] *Id.*

pressure and consent agreements.[17] Ironically, the access-to-justice crisis often leaves those accused of unauthorized practice without legal representation themselves.

Modern technology has spawned a proliferation of innovative alternative legal service providers – software and Internet-based legal document completion and filing services; unbundled legal information and communication platforms; client and lawyer matching services, among a variety of other new business models. Alternative providers of such services, including *amici* here, have a critical role to play in reducing the cost of legal information and services and improving access to justice. Alternative providers may provide low-cost access to legal forms, legal information and support for people navigating legal processes. They may provide easier and cheaper ways to find attorneys willing to represent them. But these innovators – like innovations introduced into the legal market in the past[18] – are perceived as a threat

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[17] *Id.*

[18] *See, e.g., Bates v. Arizona State Bar*, 433 U.S. 350 (1977) (First Amendment prevents state bars from punishing lawyers for publishing truthful advertisements); *New York County Lawyers' Ass'n v. Dacey*, 287 N.Y.S.2d 422 (N.Y. 1967), *aff'ing on dissenting op. below*, 283 N.Y.S.2d 984 (N.Y. App. 1967) (layman's publication of *How to Avoid Probate!* book with legal forms and instructions protected by First Amendment from local bar association's effort to ban its publication); *In re Nolo Press/Folk Law, Inc.*, 991 S.W.2d 768, 773-75 (Tex. 1999) (mandamus action arising from state UPL committee's effort to ban legal self-help publications and software).

by some practicing lawyers and bar associations. This Court should not accept Petitioner and its supporting *amici*'s request to tear down the existing bulwark against the potential anticompetitive abuse of state power by financially self-interested regulators.

B. This Court correctly treats financially self-interested market participants as private parties, even when a state gives them regulatory power and calls them a state agency.

This Court's precedents hold that financially self-interested market participants – such as the board of dental examiners here and many state bar associations – are private entities subject to Sherman Act scrutiny when they regulate competition in their own markets. Designating a dental board or bar association controlled by market participants a "state agency" "does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members." *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791 (1975). In *Goldfarb*, this Court treated the Virginia State Bar as a private actor when the Bar took a variety of actions to enforce a minimum fee schedule for legal services that had been set by a county bar association. Enforcing those minimum fees was "essentially a private anticompetitive activity" and was not beyond the reach of the Sherman Act. 421 U.S. at 792.

This Court has recognized that the threat of unregulated anticompetitive conduct increases when a

decision-making body "is composed, at least in part, of persons with economic incentives to restrain trade" and "the restraint is imposed by persons unaccountable to the public." *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 501-02 (1988) (citing *Goldfarb* and *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 707-08 (1962)). "We may presume, absent a showing to the contrary, that [a government] acts in the public interest. A private party, on the other hand, may be presumed to be acting primarily on his or its own behalf." *Allied Tube & Conduit Corp.*, 486 U.S. at 501 (quoting *Hallie v. Eau Claire*, 471 U.S. 34, 45 (1985)).

Financially self-interested agencies escape Sherman Act scrutiny only when the competitive restraints they impose are "clearly articulated and affirmatively expressed" as state policy, and their regulatory actions are "'actively supervised' by the State itself." *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) ("*Midcal*") (quoting *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978) (opinion of Brennan, J.)). Clear articulation of state policy and active state supervision of such agencies are required because, without those limitations, "there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests." *Patrick v. Burget*, 486 U.S. 94, 101 (1988).

C. The Board of Dental Examiner's unsupervised, anticompetitive regulation of its self-defined market monopoly closely resembles the unsupervised, anticompetitive actions of some state bar associations.

Typically, professional self-regulatory bodies like the dental board here and state bar associations are elected by and accountable to their members, rather than to the public. This Court's concern in *Allied Tube* that private actors given regulatory authority tend to act "on their own behalf" is borne out by the facts in this case, by scholarly research, and by the actual experience of legal market innovators.

The dental board here mailed cease-and-desist letters to perceived competitors for teeth-whitening business and to their landlords without a clear articulation in state legislation that teeth-whitening was "dentistry" under state law, and without state supervision of its enforcement actions. The board's threatening letters exceeded its power under state law, and the letters' *in terrorem* effect reduced competition and increased prices. The board's control by active, practicing dentists gave no assurance that its cease-and-desist letter campaign promoted state policy rather than the private interest of dentists. *See Patrick*, 486 U.S. at 101 (no assurance that private parties' unsupervised anticompetitive conduct promotes government policy, rather than private interest).

The dental board's letter campaign closely resembled – indeed, was modeled after – the North Carolina State Bar's enforcement practices in the legal services market. Like the dental board, that state bar conducts investigations and issues cease-and-desist letters to non-lawyers, accusing them of the unauthorized practice of law or UPL. Not coincidentally, that state bar and several others are *amici* supporting Petitioner, asking this Court to abandon the requirement of active state supervision over their power to enforce the legal monopoly granted to their members.

State bar UPL enforcement – especially when challenging perceived competition from non-lawyers – often suffers from the same inadequacies as the dental board's actions here. There is often no clearly articulated state policy on what constitutes "the practice of law."[19] What constitutes UPL is notoriously poorly defined, often treated on a case-by-case basis, leaving state bars with broad discretion to choose targets for enforcement.[20] State bars face little supervision by the state or scrutiny by the public. Their UPL investigations often take place behind closed doors and outside the reach of public information statutes.[21] Increasing

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[19] Matthew Rotenberg, Note, *Stifled Justice: The Unauthorized Practice of Law and Internet Legal Resources*, 97 MINN. L. REV. 709, 717-18 (2012).

[20] *Id.*

[21] For example, until corrected by judicial rule-making, the Texas Unauthorized Practice of Law Committee claimed that not

(Continued on following page)

this opacity, some state bars hold short of taking formal enforcement actions that would subject their UPL enforcement to independent judicial review. Rather, they rely on closed-door investigations, cease-and-desist letter demands, and opinions released by small committees of members, typically volunteers. Even without judicial enforcement, such "official" actions effectively suppress competition for legal services.

Some state bars' UPL committees – usually composed of volunteer attorneys in private practice – issue *sua sponte* opinions determining that certain actions or even specifically-named companies are violating state law. Likewise, state bar ethics committees composed of volunteers in private practice issue ethics opinions that conclude, without judicial oversight, that attorneys who choose to participate in innovative legal service models risk professional discipline. Unsupervised and issued by financially self-interested practitioners, these opinions restricting law practice have the same effect as concerted refusals to deal. *See Goldfarb*, 421 U.S. at 781-82.

Recent examples of how some state bars have used this unsupervised power to suppress perceived

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only were its investigations private, but also that its *rules* and its *membership* were secret from the public and from the parties it investigated. *See In re Nolo Press/Folk Law, Inc.*, 991 S.W.2d 768, 773-75 (Tex. 1999).

competition may shed light on this Court's consideration of whether to retrench on *Midcal*'s "clear articulation" and "active supervision" requirements, as Petitioner and the state bar *amici* request.

1. Anticompetitive state bar UPL opinions.

Responding to "many informal inquiries" by its members, the Connecticut Bar Association's UPL committee in early 2008 *sua sponte* published an "informal opinion."[22] The opinion specifically named *amicus* LegalZoom and another alternative legal provider and accused both of violating Connecticut law. The committee based its opinion solely on what it saw on the Internet – it gave the companies no notice it was considering the issue; it gave them no opportunity to be heard; it sought no public input; and it conducted no hearing. The bar took no enforcement action – that would have brought independent judicial review. Nonetheless, this state "agency" opinion remains online, derogating and discouraging perceived competition from non-lawyers.[23]

In 2008, *amicus* North Carolina State Bar published a "cease-and-desist" letter addressed to LegalZoom, claiming that its services were "illegal in North

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[22] Ct. Bar Ass'n UPL Comm. Informal Op. 2008-01 (2008) (available at http://www1.ctbar.org/sectionsandcommittees/committees/UPL/08-01.pdf).

[23] *Id.*

Carolina and must end immediately."[24] The letter directly contradicted a letter the bar had sent to LegalZoom in 2003, telling LegalZoom it was *not* engaged in the unauthorized practice of law.[25] The bar's unexplained about-face shows that its market regulation is not following a clearly-articulated state policy nor is it actively supervised by the state. Like the Connecticut bar, the North Carolina bar took no direct enforcement action for five years, avoiding judicial review of its action.

Unsupervised, financially self-interested market regulation emboldens other financially self-interested regulators. In 2010, the Pennsylvania Bar Association's UPL committee, relying on the Connecticut and North Carolina bars' actions, issued its own "formal opinion," concluding that only attorneys could provide online legal document services "beyond the supply of preprinted forms selected by the consumer."[26] Like the Connecticut bar, the Pennsylvania bar gave no notice to affected parties; it provided no opportunity to be heard; sought no public input; and conducted no hearing.

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[24] *See* Original Complaint at 8, *LegalZoom.com, Inc. v. North Carolina State Bar*, No. 11-CVS-15111 (Super. Ct., Wake County, N.C. Sept. 30, 2011).

[25] *Id.* at 6-7.

[26] Pa. Bar Ass'n UPL Comm. Formal Op. 2010-01 (2010) (available at https://www.pabar.org/public/committees/unautpra/Opinions/2010-01LglDocument Preparation.pdf).

2. Anticompetitive state bar ethics opinions.

While operating as a limitation on their own members' actions, professional responsibility standards also may effectively discourage innovation and competition in the legal services markets, reinforcing bar members' monopoly while disserving consumers. *Goldfarb*, 421 U.S. at 781-82. The attorney price-fixing in *Goldfarb* is just one example; bar associations have a history of informal, unsupervised market regulation.

For example, in 2005, with no public input or hearing, the Texas State Bar Professional Ethics Committee (comprised entirely of licensed attorneys) issued an opinion holding that attorneys could not participate in an innovative online system that matched attorneys with prospective clients.[27] This system not only helped licensed attorneys find prospective clients, but by simplifying the process for consumers, increased access to lawyers while allowing competition to lower prices. Texas attorneys risked sanctions if they participated, effectively preventing such systems from operating in Texas. The next year, after an effected entity objected and another opinion was sought, the committee substantially

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[27] Tex. Bar Ass'n Prof. Ethics Comm. Op. 561 (2005) (available at http://www.legalethicstexas.com/Ethics-Resources/Opinions/Opinion-561.aspx).

reversed its position, but again with no public input or hearing or state supervision.[28]

More recently, again with no public input, the South Carolina Bar issued an advisory opinion holding that its members could not participate on *amicus* JustAnswer's question-and-answer internet site.[29] This site provides consumers with prompt, low-cost access to legal information that would not be readily available otherwise. The bar gave JustAnswer no notice or opportunity to be heard. It sought no public input and it conducted no hearing. Because South Carolina lawyers risk disciplinary proceedings by participating, the "informal" opinion effectively stifled innovation and competition with no state supervision or judicial review.

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[28] Tex. Bar Ass'n Prof. Ethics Comm. Op. 573 (2006) (available at http://www.legalethicstexas.com/Ethics-Resources/Opinions/Opinion-573.aspx).

[29] S. C. Bar Ass'n Ethics Adv. Op. 12-03 (2012) (available at http://www.scbar.org/MemberResources/EthicsAdvisoryOpinions/OpinionView/ArticleId/1211/Ethics-Advisory-Opinion-12-03.aspx).

III. SUBJECTING STATE BAR ASSOCIATIONS TO ANTITRUST OVERSIGHT WHEN THEY POLICE THE BOUNDARIES OF THEIR MONOPOLY ON LEGAL SERVICES DOES NOT UNDERMINE THEIR ABILITY TO PROMOTE ETHICAL AND COMPETENT BEHAVIOR BY THEIR MEMBERS.

The state bar association *amici* supporting Petitioner vastly overstate the impact of the Fourth Circuit's decision below. It will not lead to new layers of bureaucracy – under *Goldfarb*, state bars are *already* subject to antitrust scrutiny when they use their informal powers to benefit their members, rather than to promote a clearly articulated state policy.

The promulgation of admission and disciplinary rules is typically done with adequate process and review. Bar members and applicants have substantial incentive to monitor the scope and application of those rules. Admission decisions and disciplinary proceedings are ultimately supervised by state courts. The state bar *amici* provide no examples – either case law or anecdotal – that *Goldfarb* has restricted their ability to ensure ethical and competent behavior by their members.

The state bar *amici* supporting Petitioner incorrectly conflate actions promoting ethical and competent behavior by bar members with enforcement by bar members of their own monopoly over the practice of law. Self-regulation and monopoly-enforcement implicate very different state interests. It is not essential that private, financially self-interested market

participants conduct both functions. Bar associations may effectively regulate their members' admission and professional conduct without also holding the power to enforce their members' monopoly against non-members. Unauthorized practice restrictions may be enforced by numerous state officials who, unlike state bar associations, do not have a direct financial interest in suppressing perceived competition. Judges, state and federal prosecutors, administrative agencies and attorneys general all typically have the power to take action against the unauthorized practice of law.

The Fourth Circuit's decision follows this Court's existing precedent that treats private parties as such when acting in their own interests, including restricting competition within their regulated market. Petitioner and its allied state bar *amici* seek a dangerous change in the law that would remove meaningful review of financially self-interested private parties empowered by state law to enforce their own monopolies. Nothing in the Sherman Act or this Court's precedent supports, let alone requires, this disquieting result.

CONCLUSION

No doubt many, if not most, private attorneys given the power by states to enforce the professional bar's monopoly over the practice of law are honorable individuals. However, logic, academic research and the real-life experience of consumers and innovative

service providers show that actual, active state oversight of financially-interested market participants remains a fundamental check on the potential for abuse. This Court should decline the request of Petitioner and its allied *amici* to undermine this existing and necessary bulwark against the unfettered ability to use state power to advance private interests at the expense of the free market.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 13-534

IN THE

Supreme Court of the United States

THE NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR AMICUS CURIAE NATIONAL COUNCIL OF EXAMINERS FOR ENGINEERING AND SURVEYING IN SUPPORT OF PETITIONER

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BRIEF FOR AMICUS CURIAE NATIONAL COUNCIL OF EXAMINERS FOR ENGINEERING AND SURVEYING IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

Founded in 1920, the National Council of Examiners for Engineering and Surveying ("NCEES") is a national nonprofit organization dedicated to advancing professional licensure for engineers and surveyors. [1] NCEES's members

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amicus curiae or its counsel made a

include 69 engineering and surveying licensure boards, from all 50 States, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands. NCEES develops, administers, and scores the standardized examinations used for engineering and surveying in the United States. It maintains model laws and rules that States can use when enacting legislation. NCEES also facilitates professional mobility and promotes uniformity of the United States licensure processes through services for its member licensing boards and licensees, such as keeping records, providing exam preparation materials, and exam administration.

NCEES is concerned that the position adopted by the FTC and the Fourth Circuit in this case, if affirmed, will subject its member licensing boards to second-guessing by federal antitrust regulators, impeding the boards' ability to effectively carry out their state-appointed task of regulating the engineering and surveying professions and protecting the general public. By denying immunity to state licensing boards that employ market participants unless they show active supervision by other parts of state government, the decision directly interferes with the sovereign right of the States and their agencies to order their own affairs. And by exposing board members to the risk of federal antitrust lawsuits and liability for doing their jobs, the decision will make it harder to recruit and retain board members willing to make the difficult decisions that are sometimes necessary to regulate the professions. By requiring additional supervision as a matter of federal law, the decision would also

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monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

interpose wasteful additional layers of bureaucracy and complicate the state decision-making process. In NCEES's view, federal regulators and courts should not be permitted to interfere in the sovereign, democratic determinations of States about how best to structure their own licensing boards in order to regulate professions in the public interest.

SUMMARY OF THE ARGUMENT

A state agency, even when directed by the legislature to fill positions with individuals who are market participants, is still a state agency, and therefore should receive antitrust immunity without having to satisfy the "active supervision" prong of *Cal. Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 104-05 (1980). The Fourth Circuit's holding that the involvement of market participants in operating a state agency renders the agency a "private actor" that must satisfy the supervision requirement impermissibly allows the FTC and courts to look behind the structure, staffing and operation of state-created licensing boards, to delve into the motives of State actors, and to deem licensing boards "private actors," simply because sovereign States chose to delegate duties and powers to boards whose members include market participants.

To lose immunity to federal antitrust law is to lose a basic protection that enables state licensing boards to fully function as delegated state agencies. If the Fourth Circuit is affirmed, these agencies will confront serious impediments to fulfilling their state-appointed duties. If affirmed, the decision below would press licensing boards into one of several paths, none of which reflects the outcome of the states' own democratic processes:

1. By retaining the status quo—*i.e.*, keeping market participants on their boards—states will expose the boards to the risk of antitrust liability for just doing their jobs. This would harm the ability of states to recruit and maintain well qualified members of the professions to serve part-time on licensing boards and would chill the boards' ability to make tough calls. Thus, States would lose many of the benefits they sought when they delegated legislative authority to licensing boards, and included on those boards the very people who were most qualified to understand the needs and concerns of the professions they are charged with regulating.

2. To the extent States can only preserve their boards' immunity by instituting "active supervision" that the FTC or federal courts may deem sufficient (but which the States had not deemed necessary), States would be forced to engage in expensive, wasteful institutional experiments, with little assurance that the supervision would reflect adequate subject-matter knowledge or satisfy any particular tribunal. Adding a layer of bureaucracy would complicate and alter the state-designed decision-making process while still subjecting boards and their members to a continued risk of liability.

3. States may feel it necessary to legislatively eliminate market participants from their licensing boards altogether in order to avoid antitrust liability. But when a decision has such coercive effect, it creates serious federalism concerns. The decision below substitutes the FTC or the courts' determination that action of a state agency is "private" over the State's own demonstrated intent to delegate regulation of professions as a sovereign state activity. This contravenes this Court's

pronouncements that antitrust law should not nullify the States' democratic processes for regulating their economies and protecting the public welfare.

ARGUMENT

I. STATE-CREATED LICENSING BOARDS ARE STATE ACTORS REGARDLESS OF WHETHER THEY INCLUDE MARKET PARTICIPANTS.

State professional licensing boards are state actors, even when their members are participants in the market regulated by the board. Acting with authority delegated from a sovereign State, the boards perform their duties as the State. The decision below erroneously holds that when an agency is operated by market participants elected by other market participants, the agency is a "private actor" that may only receive federal antitrust immunity by showing that its behavior is "actively supervised by the State itself." *Midcal*, 445 U.S. at 105. Under this Court's precedents, a sovereign State's policy is immune from federal antitrust attack, and that immunity should not be conditioned on whether the FTC thinks the agency's decision-making process is sufficiently independent from the interests of those being regulated. Pet. App. 13a. States generally employ market participants on licensing boards precisely ***because*** they have specialized knowledge and perspective gained by their participation in the regulated profession. The States should not be forced to change these sovereign legislative choices in order to satisfy the dictates of a federal regulatory agency.

In *Parker* v. *Brown*, 317 U.S. 341, 350-51 (1943), the Court concluded that "nothing in the language of

the Sherman Act or in its history * * * suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." In a long line of cases stemming from *Parker*, the Court has upheld the rule that antitrust laws do "not apply to anticompetitive restraints imposed by the States 'as an act of government.'" *City of Columbia* v. *Omni Outdoor Adver., Inc.*, 499 U.S. 365, 370 (1991) (quoting *Parker*, 317 U.S. at 352). The "threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the State acting as sovereign." *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 790 (1975). The "power to make decisions and to set policy is what gives the State its sovereign nature." *FERC* v. *Mississippi*, 456 U.S. 742, 761 (1982).

When state legislatures exercise their power to create licensing boards, they make a sovereign decision to delegate to boards the authority to regulate a profession. *See id.* at 779 (O'Connor, J., concurring in part and dissenting in part) ("It is difficult to argue that a statute structuring the regulatory agenda of a state agency is not a regulation of the 'State.'"). When a state legislature adopts legislation—as North Carolina did in creating the Board of Dental Examiners, and legislatures routinely do across the Nation in creating other licensing boards—their "actions constitute those of the State * * * and *ipso facto* are exempt from the operation of the antitrust laws.'" *Hoover* v. *Ronwin*, 466 U.S. 558, 567-68 (1984).

The States have been using this sovereign power to delegate the regulation of professions to licensing boards such as NCEES's members for more than a

century. *See, e.g.*, Douglas A. Wallace, *Occupational Licensing and Certification: Remedies for Denial*, 14 Wm. & Mary L. Rev. 46 & n.1 (1972) (noting that, in the United States, "the period from 1906-35 represented a peak in the enactment of new licensing legislation"). Today, it is not unusual for a State to license as many as 60 separate occupations. *Id.* NCEES traces its own history to the 1920s, when several States enacted laws requiring registration of engineers offering or performing professional services within their respective jurisdictions. Joana Acorn Corley, ed., *The History of the National Council of Examiners for Engineering and Surveying: 1920-2004* at ix (3d ed. 2004). NCEES's member boards "are delegated with the authority to and are charged with the responsibility of administering the provisions of the laws of their respective states/territories/jurisdictions, which is an exercise of the police powers reserved to the states by the U.S. Constitution." *Id.*

With regularity, sovereign States also direct that the boards include professionals who are market participants in order to obtain benefits that legislatures cannot readily obtain otherwise. *See S. Motor Carriers Rate Conf., Inc.* v. *United States*, 471 U.S. 48, 64 (1985) ("Agencies are created because they are able to deal with problems unforeseeable to, or outside the competence of, the legislature."). Using market participants enables professionals to be regulated by other knowledgeable and experienced professionals, rather than laypersons or other more detached and likely less informed government employees. *See Cal. Dental Ass'n* v. *FTC*, 526 U.S. 756, 772 (1999) (acknowledging "the common view that the lay public is incapable of ade-

quately evaluating the quality of medical services").[2] States benefit from this expertise without having to take on the considerable expense of having members of all of the professional boards be full-time government employees. *See Filarsky* v. *Delia*, 132 S. Ct. 1657, 1662-63, 1665-66 (2012) (need to reduce size of bureaucracy, *inter alia*, is reason for the longstanding government tradition of employing "public servant[s]" who "temporarily or occasionally discharge[] public functions" in addition to carrying on regular business). Thus, all 69 NCEES member boards include individuals that are licensed and practice in the professions they are charged with regulating.

Until the Fourth Circuit's ruling, States could employ market participants on licensing boards in this manner with the expectation that the boards' actions would receive immunity from federal antitrust law as acts of the State. *See Hoover*, 466 U.S. at 574 ("The reason that state action is immune from Sherman Act liability is * * * that the State itself has chosen to act."). Because licensing boards act as state agencies themselves, no additional State entity was required to confirm that decisions of the boards bore the imprimatur of the State or adhered to State policy.

The decision below, however, has created a cloud of doubt for States that exercise their sovereignty to establish licensing boards that include market

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[2] *See also In re Guess*, 393 S.E.2d 833, 837 (N.C. 1990) ("Certain aspects of regulating the medical profession plainly require expertise beyond that of a layman. Our legislature recognized that need for expertise when it created a Board of Medical Examiners composed of seven licensed physicians and one additional member.").

participants. In the FTC's view, the "operative factor" in determining whether antitrust immunity applies "is a tribunal's degree of confidence that the entity's decision-making process is sufficiently independent from the interests of those being regulated." Pet. App. 13a (citing FTC, *Interlocutory Order In re North Carolina State Bd. of Dental Exam'rs*, 151 F.T.C. 607, 619, 2011 WL 3568990 (Feb. 3, 2011), ("FTC Order"). The Fourth Circuit agreed, stating that *Midcal* applies "when a state agency appears to have the attributes of a private actor and is taking actions to benefit its own membership." Pet. App. 15a. Specifically, the court held that "when a state agency is operated by market participants who are elected by other market participants, it is a 'private' actor." Pet. App. 17a.

As a "private" actor, an agency is only entitled to immunity if it can show that its conduct is authorized by a "clearly articulated * * * state policy" to displace competition and the challenged conduct is "actively supervised" by state officials. *Midcal*, 445 U.S. at 104-05. The "clearly articulated" state policy prong applies equally to state agencies, municipalities, and private parties. *Hoover*, 466 U.S. at 568-69; *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34, 46 (1985); *S. Motor Carriers*, 471 U.S. at 62-64 (agencies can only implement policies adopted by "the legislature"). But under the Court's prior decisions, the "actively supervised" prong has been reserved for situations in which the State "actively supervised" the conduct of ***private*** actors—rather than the State's own agencies or a municipality—so as to "ma[ke] the conduct its own." *Patrick* v. *Burget*, 486 U.S. 94, 105-06 (1988); *see also Hallie*, 471 U.S. at 47 ("Once it is clear that state authorization exists,

there is no need to require the State to supervise actively the municipality's execution of what is a properly delegated function.").[3] The Court has never imposed the supervision requirement on an agency where the actor ***is*** a state agency. *See Hallie*, 471 U.S. at 46 n.10 ("In cases in which the actor is a state agency, it is likely that active state supervision would also not be required, although we do not here decide that issue."); *see also* Pet. Br. 3-5.

By holding that agencies with market participants elected by other market participants are "private actors," the Fourth Circuit's decision collapses an essential distinction erected by the Court's precedents. "When the conduct is that of the sovereign itself * * * the danger of unauthorized restraint of trade does not arise." *Hoover*, 466 U.S. at 569. Therefore, federal antitrust law does not forbid States from imposing market restraints "'as an act of government.'" *FTC* v. *Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1010 (2013) (quoting *Parker*, 317 U.S. at 352). The Fourth Circuit's decision portends that ***any*** state agency that is made up of market participants might end up as the target of a federal antitrust suit or agency enforcement action if the board cannot make a showing that it acted with state supervision deemed sufficient by the FTC or a court. Accordingly, if that decision is upheld, a vast number of boards and their members would be actively concerned on an ongoing basis as to whether

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[3] *See, e.g.*, *Midcal*, 445 U.S. at 105-06 (state-authorized price setting by private parties in wine business); *FTC* v. *Ticor Title Ins. Co.*, 504 U.S. 621, 634-35 (1992) (supervision requirement ensures "that the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private parties").

their day-to-day decisions might be second-guessed as a violation of federal antitrust law.

Given its important role in the operation of State licensing boards, antitrust immunity should not depend on a judicial tribunal or the FTC's fact-specific conclusions about whether a board's carrying out of sovereign functions are really serving "private" interests. The Court has specifically considered this problem with respect to alleged conspiracy between a regulatory entity and independent private actors, and "reject[ed] [ ] any interpretation of the Sherman Act that would allow plaintiffs to look behind the actions of state sovereigns to base their claims on 'perceived conspiracies to restrain trade.'" *Omni*, 499 U.S. at 379 (quoting *Hoover*, 466 U.S. at 580).

In *Omni*, the Court rejected the view that "governmental *regulatory* action may be deemed private—and therefore subject to antitrust liability—when it is taken pursuant to a conspiracy with private parties." *Id.* at 375. As the Court reasoned:

> The impracticality of such a principle is evident if, for purposes of the exception, "conspiracy" means nothing more than an agreement to impose the regulation in question. Since it is both inevitable and desirable that public officials often agree to do what one or another group of private citizens urges upon them, such an exception would virtually swallow up the *Parker* rule: All anticompetitive regulation would be vulnerable to a "conspiracy" charge.

Id.

Omni explained that immunity remains despite conspiracy between private actors and government

officials, because "it [is] impracticable or beyond the purpose of the antitrust laws to identify and invalidate lawmaking that has been infected by self-ishly motivated agreement with private interests." *Id.* at 383. Instead, "where the action complained of * * * was that of the State itself, the action is exempt from anti-trust liability regardless of the State's motives in taking the action." *Id.* at 377-78.

Omni's refusal to inquire into the motives of state actors applies with even more force in the situation presented by this case, where there is no allegation that a board conspired with private, non-board members. The court below deemed the official board members themselves to be "private actors" because they are market participants elected by other market participants. App. 17a. But if the mere identity of board members as market participants is sufficient to render activity private and (without a further showing of supervision) potentially conspiratorial, then the exception would "virtually swallow up the *Parker* rule," *Omni*, 499 U.S. at 375, by allowing the FTC or courts to speculate about the motives of all state-authorized board officials.

As the Court stated in *Omni*, if a state entity's decision to regulate "is made subject to ex post facto judicial assessment" of factors such as whether the officials acted for private gain or public interest, "with personal liability of [public officials] a possible consequence, we will have gone far to 'compromise the States' ability to regulate their domestic commerce.'" *Id.* at 377 (quoting *S. Motor Carriers*, 471 U.S. at 56); *see also id.* at 378 (rejecting exception to immunity that "seeks (however impractically) to draw the line of impermissible action" as "prohibiting the restriction of competition

for private gain but permitting the restriction of competition in the public interest").

This issue is as important to NCEES as it is for petitioner. All 69 NCEES member licensing boards, like petitioner, include market participants as board members. To take one example, NCEES's member licensing board in North Carolina is authorized by the State's legislature to regulate the engineering and surveying professions in the public interest. The North Carolina Engineering and Land Surveying Act (the "Act") provides that engineering and land surveying, "[i]n order to safeguard life, health, and property, and to promote the public welfare" are "declared to be subject to regulation in the public interest." N.C. Gen. Stat. § 89C-2. No person may practice or offer to practice engineering or land surveying in North Carolina "unless the person has been duly licensed." *Id.*

Through the Act, the North Carolina General Assembly created a State Board of Examiners for Engineers and Surveyors ("E&S Board"), and assigned it the "duty * * * to administer the provisions" of the Act. *Id.* at § 89C-4. The E&S Board consists of four licensed professional engineers, three licensed professional land surveyors and two public members who are neither engineers nor land surveyors. *Id.* Each engineer and land surveyor member of the Board must be a licensed professional engineer or land surveyor, respectively, "engaged in the lawful practice of engineering in North Carolina for at least six years." *Id.* at § 89C-5. All members are appointed by the Governor, but the appointments are "preferably * * * made from a list of nominees submitted by the professional societies for engineers and land surveyors" in North Carolina." *Id.* at §

89C-4. Thus, the board includes market participants who, while not directly elected by other market participants (like petitioner), may be appointed from lists submitted by professional societies. Each member of the E&S Board receives a certified appointment from the Governor and must "file with the Secretary of State a written oath or affirmation for the faithful discharge of the duties." *Id.*

The legislature gives the E&S Board numerous powers binding on all licensees, including the right to adopt and amend rules of procedure reasonably necessary to perform its duties; to regulate its procedures, meetings and records; to administer exams; and to enforce rules of professional conduct. N.C. Gen. Stat. § 89C-10(a). The E&S Board is required to adopt an official seal, *id.* at § 89C-10(b), and may "in the name of the State" apply for injunctive relief to enforce or restrain violations of the Act, *id.* at § 89C-10(c). It may examine applicants for licenses, issue license certificates, investigate matters within its jurisdiction, establish and conduct instructional programs and refresher courses for licensees, license sponsors of continuing professional competency activities, and deal with real property in the same manner as a private person or corporation, subject only to approval of the Governor and the Council of State. *Id.* at § 89C-10(d)-(i).

The North Carolina E&S Board is illustrative of the ways that States, in an exercise of their sovereign authority, choose to organize such boards. North Carolina has chosen to delegate its authority to regulate a profession by employing market participants that are appointed by the governor from a slate of candidates presented by professional

societies, rather than by an election. Charged and even sworn to faithfully carry out the board's duties, its officials are not "private" actors; they are empowered to exercise broad authority to create and enforce policies and to undertake a variety a means to regulate the profession in the public interest. Such boards possess all attributes of state sovereignty that have long entitled them to immunity from antitrust actions. Yet under the Fourth Circuit's decision, E&S Board members—like their counterparts in all other jurisdictions, who also have market participant members—would be subject to the continual specter of antitrust claims based on whether the FTC or a court might think them "sufficiently independent from the interests of those being regulated." Pet. App. 13a.

State action immunity is too integral to the States' regulation of the professions to make it subject to second-guessing by the FTC or the courts. Licensing boards are state actors, and inclusion of market participants as members does not require the boards to clear an additional hurdle of "supervision" in order to retain immunity from antitrust liability.

II. THE DECISION BELOW PREVENTS LICENSING BOARDS FROM PERFORMING THEIR DUTIES AS THE STATE LEGISLATURES INTENDED.

If the decision below is affirmed, States that have structured their licensing boards to include market participants would generally face three alternatives going forward. States can (1) maintain the status quo; (2) attempt to predict and then implement the kind of "active supervision" of their regulatory boards that would pass muster before the FTC or a court; or (3) legislatively change the structure of

their regulatory boards to exclude market participants. All these alternatives, however, would be highly disruptive, and would make it more difficult, if not impossible, for licensing boards to carry out the duties they were created to perform. Moreover, when decisions of a federal agency and courts so radically alter a State's decision-making process through the compulsion of federal law, such coercion contravenes fundamental federalism principles.

A. By Keeping The Status Quo, States Risk Losing Their Boards' Immunity And The Intended Benefits Of Employing Market Participants.

By maintaining the status quo—keeping their licensing boards structured to include market participants—States risk exposing their boards and their board members to antitrust liability, and that threat is likely to change the way boards function, losing the benefits of the form of governance the States chose in the first place.

As discussed above, States employ market participants on licensing boards for a number of practical reasons, including their expertise, familiarity with current events, and the opportunity for them to serve as officials on boards without the expense of their having to be full-time state employees. The decision below disrupts these sensible and workable solutions by exposing officials of any board that is directed to seat market participants to the constant threat of antitrust liability. The Sherman Act bars "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce * * *" 15 U.S.C. § 45(a)(1). The prohibition applies to "[e]very

contract, combination * * *, or conspiracy, in restraint of trade." 15 U.S.C. § 1. The Sherman Act and Clayton Act authorize both the FTC and private individuals, respectively, to enforce their prohibitions. 15 U.S.C. §§ 15, 45. Under these broad standards, myriad acts of state licensing boards could be subject to allegations of anticompetitive activity—as petitioner's decisions were in this case—because one of the main functions of such boards is to prevent non-qualified actors from engaging in certain market activities.

Exposing boards and their members to antitrust liability for simply doing their jobs is likely to drain state professional regulatory agencies of expertise, and make it harder to recruit other qualified officers. Practicing professionals will obviously be concerned about incurring the significant liability created by exposure to federal antitrust laws, making them reluctant to serve in those positions. This Court has long recognized that affording immunity to state actors protects the "'government's ability to perform its traditional functions' by providing immunity where 'necessary to preserve' the ability of government officials 'to serve the public good or to ensure that talented candidates were not deterred by the threat of damages suits from entering public service.'" *Richardson* v. *McKnight*, 521 U.S. 399, 408 (1997) (quoting *Wyatt* v. *Cole*, 504 U.S. 158, 167 (1992)). And the threat of liability may also distract from performance as an agency official. *See Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985) (lawsuits may "distrac[t] officials from their governmental duties"). As the Court has acknowledged, "[t]here can be no question that the threat of being sued for damages" under the Sherman Act "will deter 'able citizens'

from performing th[e] essential public service" of serving in a regulatory agency. *Hoover*, 466 U.S. at 580 n.34.

Moreover, without immunity even those officials who are still willing to serve on licensing boards may be more hesitant to make the tough calls. Immunity "encourage[s] the vigorous exercise of official authority," *Butz* v. *Economou*, 438 U.S. 478, 506 (1978), by contributing to "'principled and fearless decision-making,'" *Wood* v. *Strickland*, 420 U.S. 308, 319 (1975) (quoting *Pierson* v. *Ray*, 386 U.S. 547, 554 (1967)), and by responding to the concern that threatened liability would "'dampen the ardour of all but the most resolute, or the most irresponsible'" public officials. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 814 (1982) (quoting *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (L. Hand, J.)). Thus, officials may hesitate to implement or enforce a policy, such as a licensing requirement, or institute a disciplinary proceeding, for fear that it may draw allegations of anticompetitive conduct by individuals prevented from participating in the market, or by the FTC.

NCEES and its member boards are deeply concerned about the risk of unwarranted liability as a result of the Fourth Circuit's decision. Even where officials are willing to brave the risk of lawsuits by the FTC or individuals who bring suits challenging agency action, it is reasonable to expect such exposure could have a chilling effect on the officials' willingness to take actions that may be necessary to protect the public. Members of state licensing boards should not have to contend with such concerns merely for choosing to devote a portion of their valuable time to serving the public interest.

B. Requiring Additional State Supervision Would Be Wasteful And Inefficient.

States that want to continue to use market participants on their boards could preemptively seek to satisfy the *Midcal* "active supervision" requirement by attempting to predict and then implement whatever kind of supervisory apparatus would pass muster before the FTC or a court. But the standards for doing so are unclear, and such supervision would be wasteful, inefficient, and contrary to what the States themselves have decided is the best way to exercise their sovereign regulatory authority.

Where true private activity is involved, the Court has stated that the interests of competition cannot be "thwarted by casting * * * a gauzy cloak of state involvement over" allegedly anticompetitive private activity. *See Midcal*, 445 U.S. at 105-06. "The mere presence of some state involvement or monitoring does not suffice," *Patrick*, 486 U.S. at 101, and the State must show it has "exercised sufficient independent judgment and control so that the details of the [challenged action] have been established as a product of deliberate state intervention." *Ticor*, 504 U.S. at 634. It is hard enough to apply that test when a State is supervising private acts. But it is even harder when the actor being supervised is an official state agency, because these agencies are already comprised of members exercising state power. Presumably, sufficient supervision would involve a State adding some additional bureaucracy that could review the decisions of its dozens of licensing boards "to assure fealty to state policy." Pet. App. 13a (citing FTC Order, *supra*, at 622). But because the board members are themselves state officials charged with formulating and implementing

state policy pursuant to legislative directives, it is unclear what sort of further "supervision" would pass muster with the FTC or a court that does not have the effect of stripping the boards of their statutory functions or making them purely advisory.

Moreover, whether the supervision is adequate may not be known until after the conduct is complete. The Court has described the active supervision requirement as serving an "evidentiary function" as "one way of ensuring that the actor is engaging in the challenged conduct pursuant to state policy." *Hallie*, 471 U.S. at 46. But a state-created licensing board's decision is already itself state policy. Tight state budgets do not allow for continual experimentation to find an institution that will satisfy the unclear expectations of federal regulators or courts. And under the Fourth Circuit's rule, licensing boards are likely to be drawn into expensive litigation over whether supervision is adequate, further discouraging the participation of qualified members who would not know whether their acts are lawful until after those acts are taken.

The supervision requirement furthermore undermines the very goals of efficiency that the States sought to obtain by creating the boards in the first place. States create licensing boards to delegate their power to people whose greater skill and competence in an area can enable a faster response to new problems. *See S. Motor Carriers*, 471 U.S. at 64. But "requiring express authorization for every action that an agency might find necessary to effectuate state policy would diminish, if not destroy, its usefulness." *Id.* States are entitled to flexibility in structuring their institutions in the manner they determine best takes advantage of the efficiencies

state boards provide, *id.*, and that flexibility is undermined by requiring an additional layer of supervisory bureaucracy as a federal mandate.

There is also a risk that whatever state entity is deemed sufficient to supervise licensing boards would become, in effect, a proxy for the preferences of federal antitrust regulators. If the FTC suspects that certain anticompetitive acts or policies reflect the action of "private" actors, such as board members who are market participants, it is likely that the FTC would be equally suspicious of the supervisory body's approval of the action or policy as "a product of deliberate state intervention." *Ticor*, 504 U.S. at 634. Second-guessing this second supervisory body would, in all likelihood, run afoul of other basic principles of the immunity doctrine that "preclude[] inquiry into the question whether competition is good or bad." *Soc'y of Prof'l Engr's* v. *United States*, 435 U.S. 679, 695 (1978). *See, e.g.*, *Omni*, 499 U.S. at 375-77 (federal regulators cannot second guess whether "governmental actions" are "not in the public interest"); at 378-79 (federal antitrust law "not directed to * * * vindicat[ing]" alleged "principles of good government").

In sum, States have already delegated authority to their licensing boards to make policy determinations as an exercise of state authority. The addition of another state supervisory body to ensure what the FTC or a court would view as sufficient fealty with state policy would be wasteful and inefficient, and would invite further impermissible interference in the States' democratic and administrative processes for regulating professions.

C. Federalism Prevents The Federal Government From Coercing States Into Changing Their Chosen Methods For Regulating Professions.

Having concluded that neither the status quo nor added state supervision present viable options for licensing boards, a State could reasonably conclude that the only way to ensure its boards avoid antitrust suspicion under the Fourth Circuit's rule would be to change their structure and staffing to eliminate the use of market participants altogether. However, not only would such an outcome destroy the benefits that the States sought to achieve with that chosen structure, but such an intrusion on a State's democratic decision-making process would contravene principles of federalism.

The Fourth Circuit concluded that subjecting a state regulatory agency to liability under the Sherman Act presents "no federalism issue" because of its "conclusion that the Board is a private actor under the antitrust laws." Pet. App. 28a. However, the court's determination that a state agency is a private actor raises federalism concerns by itself because it coerces States into altering their chosen means of governance in order to suit the preferences of a federal agency. This Court has explained that, given the rationale of *Parker* and our "national commitment to federalism * * * the Sherman Act should not be interpreted to prohibit anticompetitive actions by the States in their governmental capacities as sovereign regulators." *Omni*, 499 U.S. at 374.

Although the Constitution grants Congress broad powers, "federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the

governance of the Nation." *Alden* v. *Maine*, 527 U.S. 706, 748 (1999). *See also United States* v. *Lopez*, 514 U.S. 549, 583 (1995) (Kennedy, J., concurring). The Constitution contemplates that a State's government will represent and remain accountable to its own citizens. *See New York* v. *United States*, 505 U.S. 144, 168-169 (1992); *Lopez*, 514 U.S. at 576-577 (Kennedy, J., concurring). It is fundamental that the people of a State "may alter and change their form of government at their own pleasure." *Luther* v. *Borden*, 48 U.S. (7 How.) 1, 47 (1849). A State is accorded respect for its choices about "the character of those who exercise government authority" and "the structure of its government," and those choices are integral to how "a State defines itself as a sovereign." *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991). And "essential" to States' independence is "'their power to prescribe the qualifications of their own officers.'" *Id.* (internal quotation omitted). This is vitally true in the manner in which state legislatures exercise their authority to protect the public through the regulation of professions. *See, e.g.*, *Barsky* v. *Bd. of Regents*, 347 U.S. 442, 449 (1954) (explaining that the "broad power to establish and enforce standards of conduct within its borders relative to the health of everyone" is "a vital part of a state's police power").

The Court has therefore cautioned against interpreting the antitrust laws so as to encroach on the States' internal governance decisions. The dual system of government makes States sovereign, and "an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Parker*, 317 U.S. at 351; *Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S.

389, 412 (1978). In *Parker*, the Court held that "nothing in the language of the Sherman Act or in its history" indicated that Congress intended to restrict the sovereign capacity of the States to regulate their economies. 317 U.S. at 350. The state-action antitrust exemption is intended to protect "principles of federalism and state sovereignty' out of a recognition of the "the role of sovereign States in a federal system." *Omni*, 499 U.S. at 370.

Licensing boards embody their respective States' chosen form of governance. The States' decisions to use market participants on their boards reflects a democratically-considered decision to regulate professions (and with it, the population's safety and economic welfare) in a certain manner. The Sherman Act is not intended to "nullify a state's control over its officers and agents in activities directed by the legislature." *Hallie*, 471 U.S. at 38 (quoting *Parker*, 317 U.S. at 351). Indeed, the state immunity doctrine is designed to "protect the result of the state's political process even if that result is fundamentally at odds with federal antitrust policy." C. Douglas Floyd, *Plain Ambiguities in the Clear Articulation Requirement for State Action Antitrust Immunity: The Case of State Agencies*, 41 B.C. L. Rev. 1059, 1067 (2000). "*Parker* contains no hint that the Court intended to prescribe the forms of state government, or to pick and choose among anticompetitive policies validly adopted by the state as a whole for an authorized representative of state government." *Id.* at 1104.

Nonetheless, as discussed, the decision below effectively nullifies the States' power by compelling States that seat market participants to face a limited number of undesirable options—all different from

what the States had originally chosen for themselves through their own democratic processes. When the States' immunity from private suits is removed, "the course of their public policy and the administration of their public affairs" may become "subject to and controlled by the mandates of judicial tribunals without their consent, and in favor of individual interests." *Alden*, 527 U.S. at 750. (citation omitted). With respect to the regulation of professions, state licensing boards with members who are market participants may be exposed to liability suits by individual antitrust plaintiffs (likely to be the same aggrieved persons who were disfavored by the boards' regulations), or by the FTC. Alternatively, such licensing boards may have their immunity conditioned under *Midcal* on the "active supervision" of another state agency that is deemed acceptable by the FTC or a federal court. Or States may simply decide to change their structure to avoid both of those alternatives.

In any of these scenarios, federal law would be favored over sovereign state governance decisions in an area of the law—regulation of professions—that is among the states' most traditional police powers. *See Barsky*, 347 U.S. at 449. Such action imposes the "plenary federal control of state governmental processes," which "denigrates the separate sovereignty of the States." *Alden*, 527 U.S. at 749; *see also Floyd*, *supra*, at 1061 (noting criticisms that supervision requirement "imposes a costly system of 'command and control' regulation on the states as the price of obtaining antitrust immunity for their regulatory programs").

As the Court has observed, "[t]oday, as at the time of the founding, the allocation of scarce resources

among competing needs and interests lies at the heart of the political process," *Alden*, 527 U.S. at 751, and this is even more important in times of perennial state budget crises. Inevitably, the "difficult decisions involving the most sensitive and political of judgments must be made," and "[i]f the principle of representative government is to be preserved to the States, the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State, not by judicial decree mandated by the Federal Government and invoked by the private citizen." *Id.* "When the Federal Government asserts authority over a State's most fundamental political processes, it strikes at the heart of the political accountability so essential to our liberty and republican form of government." *Id.* The decision below has effectively deprived States of one widely chosen, sensible and reasonable form of governing their professions and economies, in favor of another structure effectively mandated by federal antitrust law. Such disrespect runs contrary to principles of federalism.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment below.

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AMICUS CURIAE BRIEF

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THE NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL GOVERNORS ASSOCIATION, THE NATIONAL CONFERENCE OF STATE LEGISLATURES, AND THE COUNCIL OF STATE GOVERNMENTS AS AMICI CURIAE SUPPORTING PETITIONER

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INTEREST OF AMICI CURIAE[1]

Amici are organizations whose members include state governments and officials from across the country. Amici regularly file briefs in matters like this one, which raise issues of concern to the Nation's States.

The National Governors Association ("NGA"), founded in 1908, is the collective voice of the Nation's governors. NGA's members are the governors of the fifty States, three Territories, and two Commonwealths.

The National Conference of State Legislatures ("NCSL") is a bipartisan organization that serves the legislators and staffs of the Nation's fifty States, its Commonwealths, and Territories. NCSL provides research, technical assistance, and opportunities for policymakers to exchange ideas on the most pressing state issues. NCSL advocates for the interests of state governments before Congress and federal agencies, and regularly submits amicus briefs to this Court in cases, like this one, that raise issues of vital state concern.

The Council of State Governments ("CSG") is the Nation's only organization serving all three branches of state government. CSG is a region-based forum that fosters the exchange of insights and ideas to help state officials shape public policy. This offers unparalleled regional, national, and international opportunities to network, develop leaders, collaborate, and create problem-solving partnerships.

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[1] Letters consenting to the filing of amicus briefs have been filed by the parties with the Clerk of Court. No counsel for a party authored this brief in whole or in part, and no person, other than amici, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

This case implicates an issue of singular importance for state governments—whether state boards and commissions receive immunity from prosecution under the federal antitrust laws when they take purportedly anticompetitive actions pursuant to a clearly articulated state policy to displace competition, but without the active supervision of the State. Many of amici's members use boards and commissions to implement public policy. Their interest in the proper application of federal antitrust law to the States and their agents, and thus the proper resolution of this case, is manifest.

INTRODUCTION

In framing the federal antitrust laws, Congress did not seek "to restrain a state or its officers or agents from activities directed by its legislature." *Parker* v. *Brown*, 317 U.S. 341, 350-351 (1943). As a consequence, this Court has held that acts of substate governmental entities are fairly attributable to the State—and thus not subject to federal antitrust scrutiny—if any alleged anticompetitive effect is a "'foreseeable result' of what [a state] statute authorizes." *City of Columbia* v. *Omni Outdoor Adver., Inc.*, 499 U.S. 365, 373 (1991) (quoting *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34, 42 (1985)). "Once it is clear that state authorization exists, there is no need to require the State to supervise actively the [public entity's] execution of what is a properly delegated function." *Town of Hallie*, 471 U.S. at 47.

The clear and administrable rules that effectuate the *Parker* doctrine are grounded in "principles of federalism and state sovereignty." *Town of Hallie*, 471 U.S. at 38. These rules permit States, working against the backdrop of scarce state resources and limited state personnel, to delegate regulatory and policy-making duties over a wide array of state functions to semi-autonomous boards and commissions. Today, States

regularly use such boards and commissions to carry on their day-to-day business. Indeed, States rely on hundreds of unique boards and commissions that oversee everything from professional licensing to the resolution of workplace disputes to environmental policy.

The Fourth Circuit's decision below calls into question whether this well-established method of delegating state authority can continue. In a significant departure from *Parker* and its progeny, the Fourth Circuit treated members of state boards and commissions who are also market participants like private individuals who must demonstrate both clearly articulated authority to displace competition *and* active supervision by the State before receiving antitrust immunity. *See North Carolina State Bd. of Dental Exam'rs* v. *FTC*, 717 F.3d 359, 370 (4th Cir. 2013); *see also California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 105-106 (1980) (articulating two-step test for whether a "*private* price-fixing arrangement" receives federal antitrust immunity (emphasis added)). The decision will negatively affect *all* agencies, for the two principal reasons that amici explain below.

SUMMARY OF ARGUMENT

I. The Fourth Circuit's decision overlooked the federalism and governance concerns that animate this Court's "state action immunity" case law by ignoring the tremendous reliance that States place on boards and commissions to carry out day-to-day functions. Every State uses boards and commissions, including entities structured like the North Carolina State Board of Dental Examiners. These state agents carry out a wide variety of tasks that extend far beyond simply regulating professions, and their members are generally held to high standards of conduct that prevent self-dealing or favoritism. The Fourth Circuit's blithe im-

position of an unwarranted "active supervision" requirement for these entities runs roughshod over this Court's federalism-inflected "state action immunity" doctrine.

II. The Fourth Circuit's decision disregarded this Court's precedent holding that the inquiry into whether a substate entity is entitled to *Parker* immunity ends when the entity demonstrates that it is acting pursuant to a clearly articulated state policy to displace competition. In particular, this Court's decision in *City of Columbia* v. *Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991), exemplifies this rule. There, the Court refused to create a test that would look beyond the clear-articulation requirement if a party establishes that the state official may be biased. The rule announced in *Omni* is the only workable test that successfully balances the dangers of self-interested decision making with deference to the States and the practical realities of day-to-day governance.

ARGUMENT

I. EVERY STATE RELIES ON BOARDS AND COMMISSIONS TO IMPLEMENT A WIDE VARIETY OF FUNCTIONS

Substate entities like state boards and commissions have long been shielded from federal antitrust law, without regard to their composition. Indeed, *Parker* v. *Brown* itself granted antitrust immunity to a state agency made up of market participants—California's Agricultural Prorate Advisory Commission. *See* 317 U.S. 341, 344-346 (1943); Pet. 22-23. What has traditionally mattered for the analysis is whether the substate entity has carried out its business at the State's direction. *Parker*'s progeny have thus been respectful of the authority of substate governmental actors to be-

have in an anticompetitive manner when the State deems such regulation to be appropriate.

For example, in *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978), all nine Justices agreed that substate actors receive greater protection from federal antitrust law than private actors. Specifically, the plurality opinion held that *Parker*'s reasoning extended to certain government entities within a State, based on the degree to which a decision to permit the use of potentially anticompetitive measures in pursuit of public goals could fairly be attributed to the State itself. *Id.* at 416-417 (so long as "the State itself has ... directed or authorized an anticompetitive practice, the State's subdivisions" receive immunity). That decision struck a balance that permitted the States "to use their municipalities to administer state regulatory policies free of the inhibitions of the federal antitrust laws without at the same time permitting purely parochial interests to disrupt the Nation's free-market goals." *Id.* at 415-416.[2] The dissenting Justices would have gone even further, holding that the substate entity merited *Parker* immunity regardless of whether the State had clearly articulated its authority to act in an anticompetitive manner. *Id.* at 426-427 (Stewart, J., dissenting); *id.* at 438 (imposing antitrust liability on municipal government actors would "greatly ... impair the ability of a State to delegate government power broadly").

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[2] *See also* 435 U.S. at 417 (Marshall, J., concurring) (acknowledging that there is a "'state action' exemption from the antitrust laws" and agreeing that the plurality's test is appropriate); *id.* at 425 n.6 (Burger, C.J., concurring in part and concurring in the judgment) ("I agree with the plurality that a State may cause certain activities to be exempt from the federal antitrust laws by virtue of an articulated policy to displace competition with regulation[.]").

Later "state action immunity" decisions were similarly cognizant and respectful of the role that substate entities play in the efficient and sound administration of the States' day-to-day business. In *Town of Hallie* v. *City of Eau Claire*, the Court specifically rejected the position that "a legislature must expressly state in a statute or legislative history that the legislature intends for the delegated action to have anticompetitive effects." 471 U.S. 34, 43 (1985). The Court reasoned that such a high standard—which would require "a close examination of a state legislature's intent"—would risk "detrimental side effects upon municipalities' local autonomy and authority to govern themselves," and "would embroil the federal courts in the unnecessary interpretation of state statutes," thereby "undercut[ting] the fundamental policy of *Parker*." *Id.* at 44 & n.7.

In a separate decision issued the same day as *Town of Hallie*, the Court remarked on the critical role that state agencies play in enacting state policy and the importance of policing the *Parker* doctrine so as not to interfere with their proliferation: "Agencies are created because they are able to deal with problems unforeseeable to, or outside the competence of, the legislature. Requiring express authorization for every action that an agency might find necessary to effectuate state policy would diminish, if not destroy, its usefulness." *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, 471 U.S. 48, 64 (1985); *see also id.* at 57 n.21 (rejecting rule that "would prompt the 'kind of interference with state sovereignty ... that ... *Parker* was intended to prevent'" (alterations in original)).

This Court's "state action immunity" doctrine has thus developed against the backdrop of a robust understanding of the many ways in which substate boards and commissions effectuate state policy, and with a

sensitivity for how the imposition of potential federal antitrust liability distorts state decision making in this regard. If the Fourth Circuit's ruling stands, the conditions under which boards and commissions receive antitrust immunity may vary based on the professional experience of individual members and the manner in which they are selected to serve. This unpredictability would diminish substate entities' usefulness in carrying out critical state functions that may, and often do, have anticompetitive effects. Given the likely deleterious effects of upholding the Federal Trade Commission's position in this case, it is worth surveying the vast number and types of state boards and commissions, as well as the existing restrictions on their members that prevent self-dealing or favoritism.

Boards and commissions are pervasive, with States as diverse in size and geographical location as Arizona, Illinois, Utah, Hawaii, Texas, New Jersey, Wyoming, California, Massachusetts, Arkansas, and Indiana each maintaining well over a hundred boards and commissions to help carry out vital state functions.[3] Many of

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[3] *See* National Conference of State Legislatures, *Examples of Boards and Commissions—Statutorily Created* (Feb. 11, 2013) (on file with State & Local Legal Center) (discussing Arizona, Utah, and Wyoming); State of Hawaii, *Boards and Commissions*, http://governor.hawaii.gov/about/boards-and-commissions/ (last visited May 29, 2014); Texas State Directory, *Agencies, Boards and Commissions*, http://www.txdirectory.com/online/abc/ (last visited May 29, 2014); State of New Jersey, *Find Boards, Commissions and Authorities*, http://nj.gov/governor/admin/search.html (last visited May 29, 2014); State of California, *State Agencies*, http://www.ca.gov/Apps/Agencies.aspx (last visited May 29, 2014); Commonwealth of Massachusetts, *Boards and Commissions*, http://appointments.state.ma.us/ (last visited May 29, 2014); State of Arkansas, *Agencies*, http://www.arkansas.gov/government/agencies/ (last visited May 29, 2014); State of Indiana, *Boards & Commissions Master Sheet*, http://www.in.gov/gov/files/

these boards and commissions are composed—either by statutory directive or simply as a practical matter—of market participants in the relevant field.

As the National Governors Association explains to its members, a "governor's authority to select and nominate persons to positions" such as those on "state boards and commissions, is one of the [governor's] most important responsibilities," as these "individuals ... will carry out a much broader range of management and policymaking functions" than the "limited number" the governor can personally manage.[4] Indeed, *all* the States, as well as the District of Columbia and a number of U.S. Territories, rely on boards and commissions made up of elected or appointed members.

State governments depend upon boards and commissions to carry out a wide range of essential functions. Among other things, States often use them to regulate professionals ranging from accountants to barbers, from nurses to lawyers, from physical therapists to real estate appraisers, and from veterinarians to pharmacists.[5]

Alphabetical_Board_Listing_Jan_2013_UPDATED.pdf (last visited May 29, 2014).

[4] National Governors Ass'n, *Governor's Office Guide: Appointments* (2012), *available at* http://www.nga.org/files/live/sites/NGA/files/pdf/GOVOFFICEGUIDEAPPOINTMENTS.PDF.

[5] *E.g.*, State of California, *California Board of Accountancy*, http://www.dca.ca.gov/cba/board_info/mission.shtml (last visited May 29, 2014); Commonwealth of Massachusetts, *Board of Registration of Barbers*, http://www.mass.gov/ocabr/licensee/dpl-boards/br/ (last visited May 29, 2014); Commonwealth of Virginia, *Virginia Board of Nursing*, http://www.dhp.virginia.gov/nursing/ (last visited May 29, 2014); State Bar of Michigan, *Admissions, Ethics, & Regulation*, http://www.michbar.org/professional/ (last visited

California, for example, is dependent upon twenty-five regulatory boards responsible for "licensing and oversight of various professions." These boards "make important decisions on [state] policies and on disciplinary actions against professionals who violate state consumer protection laws." They also "approve regulations and help guide licensing, enforcement, public education and consumer protection activities."[6]

May 29, 2014); Ohio Occupational Therapy, Physical Therapy, and Athletic Trainers Board, *Physical Therapy Section Information*, http://otptat.ohio.gov/PhysicalTherapySection.aspx (last visited May 29, 2014); State of Arkansas, *Arkansas Appraiser Licensing & Certification Board*, http://www.arkansas.gov/alcb/ (last visited May 29, 2014); State of Oregon, *Veterinary Medical Examining Board*, http://www.oregon.gov/OVMEB/Pages/index.aspx (last visited May 29, 2014); State of Missouri, Div. of Prof'l Registration, *Board of Pharmacy*, http://www.pr.mo.gov/pharmacists.asp (last visited May 29, 2014).

Notable for present purposes, every State, the District of Columbia, and two Territories have a dental board charged with regulating the profession. *See* American Dental Ass'n, *State Dental Boards*, http://www.ada.org/en/education-careers/dental-student-resources/dental-examinations-and-licensure-for-students/understanding-licensure/support-and-resources/state-dental-boards (last visited May 29, 2014). Likewise, each State, the District of Columbia, and three Territories have a board that oversees optometrists. *See* National Bd. of Exam'rs in Optometry, *State Board Offices*, http://www.optometry.org/state_board.cfm (last visited May 29, 2014). The States also rely on substate entities to regulate attorneys and medical doctors. *See* American Bar Ass'n, *State & Local Bar Associations*, http://www.americanbar.org/groups/bar_services/resources/state_local_bar_associations.html (last visited May 29, 2014); Federation of State Med. Bds., *Directory of State Medical and Osteopathic Boards*, http://www.fsmb.org/directory_smb.html (last visited May 29, 2014).

[6] *See generally* California Dep't of Consumer Affairs, *DCA Board Member Resource Center*, http://www.dcaboardmembers.ca.gov/ (last visited May 29, 2014).

Similarly, the Illinois Department of Financial and Professional Regulation relies on "more than 50 boards and committees" in order to adequately oversee "more than 1 million professionals in nearly 100 industries." The Illinois boards regulate professions related to areas that are traditionally under the sovereign control of the States such as family law—for example, the Marriage & Family Therapy Licensing & Disciplinary Board—and offer expertise in areas that the typical civil servant knows little about—for example, the Private Detective, Private Alarm, Private Security, Fingerprint Vendor, and Locksmith Board.[7]

Some States also use boards and commissions to provide resolution for workplace issues. California, for instance, uses its Occupational Safety & Health Appeals Board to resolve disputes over citations issued by the state agency responsible for protecting workers from job-related health and safety hazards.[8] Relatedly, Massachusetts' Civil Service Commission hears and decides appeals of public employees regarding their rights under the State's civil service laws.[9] The Arkansas Workers' Compensation Commission enforces the

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[7] *See generally* Illinois Dep't of Fin. & Prof'l Regulation, *Serve Illinois: A Guide to the Boards and Committees Under the Illinois Department of Financial & Professional Regulation* (Nov. 15, 2012), *available at* http://www.idfpr.com/News/2010/IDFPRBoardsFlyer.pdf.

[8] *See* California Dep't of Indus. Relations, *Occupational Safety & Health Appeals Board (OSHAB)*, http://www.dir.ca.gov/oshab/oshab.html (last visited on May 29, 2014).

[9] *See* Massachusetts Exec. Office For Admin. & Fin., *Civil Service Commission*, http://www.mass.gov/anf/hearings-and-appeals/oversight-agencies/csc/ (last visited on May 29, 2014).

State's workers' compensation laws.[10] And the Illinois Labor Relations Board oversees collective bargaining matters involving public employees.[11]

Boards and commissions in some States shape environmental policy, whether by regulating carbon emissions (*e.g.*, the California Air Resources Board, the Arkansas Pollution Control and Ecology Commission, and the Illinois Pollution Control Board), overseeing public lands (*e.g.*, the Washington Parks and Recreation Commission and the Nebraska Board of Educational Lands and Funds), or supervising the use and conservation of natural resources like oil and gas (*e.g.*, the Oklahoma Energy Resources Board and the Nebraska Oil and Gas Conservation Commission).[12] Among many other things, boards and commissions in some States also regulate public utilities that provide state residents with electricity, natural gas, water, and telephone landlines (*e.g.*, the Oregon Public Utility Com-

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[10] *See* Arkansas Workers' Comp. Comm'n, *About Us*, http://www.awcc.state.ar.us/intro.html (last visited May 29, 2014).

[11] *See* Illinois Labor Relations Bd., *Welcome*, http://www2.state.il.us/ilrb/index.asp (last visited May 29, 2014).

[12] *See* California Air Res. Bd., *Introduction to the Air Resources Board*, http://www.arb.ca.gov/html/brochure/arb.htm (last updated Feb. 5, 2013); State of Arkansas, *Arkansas Pollution Control & Ecology Commission*, http://www.adeq.state.ar.us/commission/default.htm (last visited May 29, 2014); Illinois Pollution Control Bd., *Citizens Guide To the IPCB*, http://www.ipcb.state.il.us/AboutTheBoard/CitizensGuidetotheBoard.asp?Section=Act (last visited May 29, 2014); Washington Parks & Recreation Comm'n, *About Us*, http://www.parks.wa.gov/9/About-Us (last visited May 29, 2014); Nebraska Bd. of Educ. Lands & Funds, *Welcome*, http://belf.nebraska.gov/ (last visited May 29, 2014); Oklahoma Energy Res. Bd., *About Us*, http://www.oerb.com/Default.aspx?tabid=142 (last visited May 29, 2014); State of Nebraska, *Nebraska Oil & Gas Conservation Commission*, http://www.nogcc.ne.gov/ (last visited May 29, 2014).

mission), enforce state alcohol and tobacco laws (*e.g.*, the Oklahoma Alcoholic Beverage Laws Enforcement Commission), and coordinate library services (*e.g.*, the Massachusetts Board of Library Commissioners).[13]

In short, boards and commissions carry out numerous vital state functions that they are uniquely qualified, in the judgment of the States' executive and legislative branches, to perform. Many of these boards and commissions are composed of market participants. In some instances, this is statutorily required.[14] But other

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[13] *See* State of Oregon, *Public Utility Commission*, http://www.puc.state.or.us/Pages/Index.aspx (last visited May 29, 2014); Oklahoma Dep't of Libraries, *ABC: Oklahoma Agencies, Boards, and Commissions* 63-64 (Sept. 1, 2013), *available at* http://www.odl.state.ok.us/sginfo/abc/abcs.pdf; Massachusetts Bd. of Library Comm'rs, *About the Massachusetts Board of Library Commissioners*, http://mblc.state.ma.us/mblc/index.php (last updated Dec. 9, 2008).

[14] *See, e.g.*, Edlin & Haw, *Cartels By Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. Pa. L. Rev. 1093, 1103 & n.50 (2014); Kleiner, *Occupational Licensing*, 14 J. Econ. Persp. 189, 191 (2000). For example, market participants are statutorily required to make up a majority of the membership of 90% of the Florida boards that regulate professions and 93% of such boards in Tennessee. *See* Edlin & Haw, 162 U. Pa. L. Rev. at 1103, 1157-1161. While the Fourth Circuit's decision placed some emphasis on the fact that Board members are dentists who are elected by their professional peers, *e.g.*, *North Carolina State Bd. of Dental Exam'rs* v. *FTC*, 717 F.3d 359, 370 (4th Cir. 2013), North Carolina is far from the only State that mandates that some of its boards and commissions be composed of market participants selected by members of their own profession.

For example, a sizeable majority of the members of Oklahoma's Board of Dentistry are dentists who are elected to their positions by their fellow dentists, as is also the case with South Carolina's Board of Dentistry and Alabama's Board of Dental Examiners. *See* Okla. Stat. tit. 59, § 328.7; S.C. Code Ann. § 40-15-20(B); Ala. Code § 34-9-40. Similarly, a number of the members of the

boards and commissions may be staffed by members who are market participants, or who are affiliated with market participants, simply because such individuals are among the most qualified to serve given their experience. Amici, which are composed of state governments and officials, can attest to the proliferation of boards and commissions which, of necessity, are composed of market participants. The Fourth Circuit's rule, while ostensibly concentrating on boards and commissions whose members are by statute elected by market participants, is not so limited, and introduces remarkable complications to the *Parker* analysis: Identifying which of the hundreds of existing boards and commissions have such members (and thus place a State at risk of an antitrust suit) will be a difficult and time-consuming task for the State to undertake.[15]

And such members will not easily be replaced. Federal employees are ill-suited to step into their shoes.

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governing bodies of state bars in States such as Idaho, Florida, Alaska, Washington, Georgia, Mississippi, and California are attorneys elected by other local lawyers. Idaho State Bar, *Idaho State Bar Board of Commissioners*, http://www.isb.idaho.gov/general/boc.html (last visited May 29, 2014); Fla. State Bar Rule 1-4.1; Alaska Bar Ass'n, *Board of Governors*, https://www.alaskabar.org/servlet/content/board_of_governors.html (last visited May 29, 2014); Washington State Bar Ass'n, *Bylaws* 23 http://www.wsba.org/~/media/Files/About%20WSBA/Governance/WSBA%20Bylaws/Current%20Bylaws.ashx (last visited May 29, 2014); State Bar of Georgia, *Bar Rule 1-302. Composition*, http://www.gabar.org/barrules/handbookdetail.cfm?what=rule&id=21 (last visited May 29, 2014); Mississippi Bar, *Bylaws*, http://www.msbar.org/media/602671/MB%20Bylaws%20Amended%20July%2013,%202013.pdf (last visited May 29, 2014); Cal. Bus. & Prof. Code § 6013.2(a).

[15] Additionally, States would be faced with the prospect of prospectively screening market participants from joining boards, adding additional bureaucratic hassle and artificially decreasing the pool of citizens qualified to serve.

See Garcia v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 577 (1985) (Powell, J., dissenting) ("[M]embers of the immense federal bureaucracy ... know less about the services traditionally rendered by States and localities, and are inevitably less responsible to recipients of such services, than are ... state and local commissions, boards, and agencies."). Nor can typical state or municipal employees, who also lack subject matter expertise, easily carry out these tasks. Indeed, because of the sheer breadth of subject matter for which boards and commissions are responsible, state governments would have difficulty maintaining their ordinary-course activity if they were required to find, hire, and pay state employees qualified to either replace the board and commission members or to thoroughly scrutinize each of the entities' day-to-day workings.

States are no doubt cognizant of the potential for self-dealing among these boards and commissions. More broadly, they are certainly aware of the potential for any person delegated with a modicum of state power to abuse that position of trust. Yet many States, in an exercise of their sovereign authority over an array of critical state functions, choose to carry out their business through boards and commissions, including those composed of market participants. And where they do so, those States ensure that board members and commissioners are held to high standards of conduct, similar to state employees. Established disclosure and other ethical rules offer safeguards against board and commission members engaging in favoritism and self-dealing.

The North Carolina Board of Dental Examiners, for example, is regulated under North Carolina's State

Government Ethics Act.[16] This means that the Board's members—like North Carolina legislators, judicial officers, and other public servants—are subject to requirements like "monitor[ing] & avoid[ing] conflicts of interest" and are prohibited from behavior such as "[u]sing their public position for private gain" and "[h]iring & supervising family members."[17] North Carolina has thus already placed restrictions on the actions of Board members that limit them from engaging in the self-interested behavior that concerned the FTC and the Fourth Circuit. *See also North Carolina State Bd. of Dental Exam'rs*, 717 F.3d at 370 (acknowledging that the Board's members are subject "to certain reporting requirements and 'good government' provisions in North Carolina law"); *In re N.C. Bd. of Dental Exam'rs*, 151 F.T.C. 607, 630 (2011) (observing that "each Board member submit[s] detailed financial disclosures to the Ethics Commission; the Board submit[s] an annual report to [various State officials]; and the Board submit[s] an annual audited financial report").

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[16] *See* North Carolina Ethics Comm'n, *Coverage: Covered Boards*, http://www.ethicscommission.nc.gov/coverage/coveredBoards.aspx (last visited May 29, 2014)

[17] North Carolina Ethics Comm'n, *Code of Conduct*, http://www.ethicscommission.nc.gov/coveredperson.aspx (last visited May 29, 2014); *see, e.g.*, N.C. Gen. Stat. § 138A-35(a) ("A public servant shall make a due and diligent effort before taking any action, *including voting or participating in discussions with other public servants on a board on which the public servant also serves*, to determine whether the public servant has a conflict of interest." (emphasis added)); *id.* §138A-35(b) ("A public servant shall continually monitor, evaluate, and manage the public servant's personal, financial, and professional affairs to ensure the absence of conflicts of interest."); *id.* § 138A-31 (prohibiting "[u]se of public position for private gain); *id.* §138A-40 (prohibiting "[e]mployment and supervision of members of covered person's or legislative employee's extended family").

North Carolina is hardly unique in holding its board and commission members to high standards. Ohio board and commission members, for example, are required to sign a fourteen-point agreement requiring the member promise, among other things, that he "will not use [his] position to obtain improper benefits for myself, my family, or business associates."[18] Alaska's rules similarly make clear that "[s]ervice on a state board or commission is a public trust" and that consequently "board or commission members, and their immediate family, may not improperly benefit, financially or personally, from their actions" while serving.[19] Kentucky prohibits "members of policy-making and regulatory boards and commissions" from "self dealing," obligates them to disclose any "direct or indirect interest" in issues before the board, and places limits on the gifts they may accept.[20] As one last example, Louisiana's Code of Public

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[18] *See* State of Ohio, *Pledge of Ethical Conduct* (on file with State & Local Legal Center); *see also* Ohio Exec. Order No. 2007-01S, *available at* http://ohiohighwaysafetyoffice.ohio.gov/Grantees/ExecOrder_Ethics.pdf (last visited May 29, 2014) (establishing special ethics rules for members of the governor's staff and cabinet, "[s]tate employees in those Cabinet agencies, and those employed at or appointed to State of Ohio boards and commissions").

[19] *See* State of Alaska, Dep't of Law, *Ethics Information for Members of Boards & Commissions (AS 39.52)*, http://www.law.alaska.gov/doclibrary/ethics/EthicsInfoBC.html (last visited May 29, 2014) ("The Ethics Act applies to all current and former executive branch public employees and *members of statutorily created boards and commissions.*"); *see also* Alaska Stat. § 39.52 ("Alaska Executive Branch Ethics Act").

[20] *See* Commonwealth of Kentucky, Exec. Branch Ethics Comm'n, *Ethical Guidelines for Boards and Commissions*, http://ethics.ky.gov/Pages/boardsCommissionsGuidelines.aspx (last visited May 29, 2014); *see also* Kentucky Exec. Order 2008-454, *available at* http://ethics.ky.gov/SiteCollectionDocuments/Executive Order2008-454.pdf (last visited May 29, 2014) (entitled "Relating

Ethics—which governs the conduct of "all state and local public employees" and "elected officials other than judges"—covers members of boards and commissions.[21] The Code prevents board and commission members from engaging in behavior like "participat[ing] ... in a transaction involving" the board in which the members, their immediate families, or their investments "have a substantial economic interest."[22]

It is not necessary to use federal antitrust law to police these standards. (Nor is it appropriate, *see infra* pp. 28-30). The States are equipped to deal with ethical lapses by state board and commission members. While "the scope and procedures for handling ethics complaints or violations vary," *every* State oversees its officials to ensure that its ethics laws are respected.[23] Forty-two States "provide external oversight of their ethics laws through an ethics commission established in statute or in the constitution."[24] The remaining eight provide oversight via "other state agencies such as the Of-

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To Standards Of Ethical Conduct In The Executive Branch Of State Government").

[21] *See* Louisiana Ethics Admin. Program, *The Louisiana Code of Governmental Ethics* (July 2013), http://ethics.la.gov/Pub/Laws/ethsum.pdf; *see also* La. Rev. Stat. Ann. §§ 42:1101-1170 (entitled "Code of Governmental Ethics").

[22] *See* Louisiana Ethics Administration Program, *The Louisiana Code of Governmental Ethics*.

[23] *See* Huntley & Kerns, *Tough Calls: States Tailor Ethics Oversight*, 15 Legisbrief, no.2, at 1 (Jan. 2007), *available at* http://www.ncsl.org/documents/legisbriefs/Tough_Calls_Jan07.pdf; Nat'l Conf. of State Legislatures, *Ethics: State Ethics Commissions*, http://www.ncsl.org/research/ethics/state-ethics-commissions.aspx (last updated Jan. 2014).

[24] Nat'l Conf. of State Legislatures, *Ethics: State Ethics Commissions*.

fice of the Secretary of State or Office of Attorney General or a legislative ethics committee."[25] These oversight entities help ensure that the "comprehensive ethics laws" enacted across the Nation are followed.[26] While "no consensus exists" among the States "as to which punishment fits the crime" of an ethical lapse, every State considers at least some violations of its ethics laws to be criminal offenses punishable with substantial fines or prison time.[27] For example, States like Arizona, Pennsylvania, and Utah "penalize general conflict of interest violations"—such as "when [a public] official reaps a monetary or other reward from a decision made in his or her public capacity"—as felonies.[28] The States thus have adequate tools to ensure that board and commission members perform their duties appropriately and in a manner that upholds the public trust.

II. THE CLEAR ARTICULATION TEST IS THE ONLY WORKABLE RULE FOR DETERMINING WHETHER TO GRANT A SUBSTATE ENTITY IMMUNITY UNDER *PARKER*

As shown, every State relies on substate boards and commissions to carry on the day-to-day business of governance and regulation. These entities are acutely vulnerable to antitrust allegations because they use the

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[25] Nat'l Conf. of State Legislatures, *Ethics: State Ethics Commissions*.

[26] Kirsch, *Does Punishment Fit the Crime? State Penalties and Prosecutions for Ethics Violations*, 22 Legisbrief, no. 14, at 1-2 (Apr. 2014).

[27] *Id.*; National Conf. of State Legislatures, *Penalties For Violations Of State Ethics And Public Corruption Laws* (Nov. 7, 2013), http://www.ncsl.org/research/ethics/50-state-chart-criminal-penalties-for-public-corr.aspx

[28] Kirsch, *Does Punishment Fit the Crime?*, at 1.

power of the state to regulate entire industries or regions and "virtually all regulation benefits some segments of the society and harms others." *Omni*, 499 U.S. at 377. While "it is not universally considered contrary to the public good if the net economic loss to the losers exceeds the net economic gain to the winners," *id.*, federal antitrust laws provide a convenient vehicle for litigious "losers" to take a second bite at the apple. That a number of boards and commissions that regulate the professions have members who have expertise in, and are therefore affiliated in some manner with, the field that they regulate, *see, e.g.*, *supra* pp. 12-13 & n.14, makes those entities particularly susceptible to allegations of self-dealing and antitrust violations.[29] But this problem is hardly limited to the narrow category of substate entities that oversee professionals. Any time a substate entity makes a decision that favors one private party over another, it may be accused of an antitrust violation.[30]

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[29] *See, e.g.*, *Earles* v. *State Bd. of Certified Pub. Accountants of La.*, 139 F.3d 1033, 1042 (5th Cir. 1998) (discussing allegations of an antitrust violation directed toward a "Board ... composed entirely of CPAs who compete in the profession they regulate"); *Hass* v. *Oregon State Bar*, 883 F.2d 1453, 1460 (9th Cir. 1989) (discussing allegations of an antitrust violation directed toward a state bar that had only "three of fifteen members [that were required to be] nonlawyer members of the public").

[30] *E.g.*, *Automated Salvage Transp., Inc.* v. *Wheelabrator Envtl. Sys., Inc.*, 155 F.3d 59, 62-63, 71, 74 (2d Cir. 1998) (granting immunity to the Connecticut Resources Recovery Authority—charged with overseeing the state's "waste-to-energy" plants—that was accused of entering into an agreement that "maintain[ed] [its] alleged monopoly over Connecticut waste disposal"); *Four T's, Inc.* v. *Little Rock Mun. Airport Comm'n*, 108 F.3d 909, 913-915 (8th Cir. 1997) (granting immunity to a local Airport Commission—charged with "operating and managing [Little Rock's] air-

Importantly, even the threat of a prolonged antitrust suit can have deleterious consequences on the ability of a board or commission to carry out its ordinary duties. As this Court has explained in the absolute immunity context, immunity from suit—even if the suit is entirely meritless—is important because it prevents officials from being "'under an apprehension that the motives that control [their] official conduct may, at any time, become the subject of inquiry in a civil suit ... It would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the government, if [they] were subject to any such restraint.'" *Nixon* v. *Fitzgerald*, 457 U.S. 731, 745 (1982) (quoting *Spalding* v. *Vilas*, 161 U.S. 483, 498 (1896)); *see also Harlow* v. *Fitzgerald*, 457 U.S. 800, 814 (1982) (failing to grant public officers qualified immunity leads to "social costs [such as] the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office"). And "state action immunity shares the same essential element of absolute, qualified and Eleventh Amendment immunities—'an entitlement not to stand trial under certain circumstances.'" *Martin* v. *Memorial Hosp. at Gulfport*, 86 F.3d 1391, 1395 (5th Cir. 1996) (quoting *Mitchell* v. *Forsyth*, 472 U.S. 511, 525 (1985)).[31]

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port and its relative properties and facilities"—that was accused of "formulat[ing] and ... impos[ing] concession fees on rental car companies that operate from the airport terminal" in an anticompetitive manner (internal quotation marks omitted)).

[31] *See also Segni* v. *Commercial Office of Spain*, 816 F.2d 344, 346 (7th Cir. 1987) (recognizing that the *Parker* doctrine has "been interpreted to create an immunity from suit and not just from judgment—to spare state officials the burdens and uncertainties of the litigation itself as well as the cost of an adverse judgment");

Given these entities' susceptibility to charges of anticompetitive conduct, and the negative impact that even the specter of such liability has on their functioning, the rules governing application of the *Parker* doctrine to state boards and commissions must be crystal clear. As this Court has long held, the *Parker* doctrine applies to substate entities once the "clear articulation" test is met. Any further, invasive inquiry into the arrangements between the state government and its agencies and commissions is both untoward and unworkable.

A. Where State Boards And Commissions Are Concerned, The Court's *Parker* Inquiry Ends Once The Court Concludes That The Clear Articulation Requirement Is Met

1. Respect for "principles of federalism and state sovereignty" led this Court to hold in *Parker* that the federal antitrust laws do not prohibit a State from adopting an anticompetitive economic policy if the State does so "as an act of government." *Omni*, 499 U.S. at 370 (internal quotation marks omitted). Subsequent decisions clarified that this immunity extends to actions taken by state and local government officials

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Commuter Transp. Sys., Inc. v. *Hillsborough Cnty. Aviation Auth.*, 801 F.2d 1286, 1289-1290 (11th Cir. 1986) (similar); *cf.* North Carolina Bar Cert Stage Br. 9-11 (discussing detrimental effect that Fourth Circuit's ruling will have on the North Carolina state bar and similar entities); American Dental Ass'n Cert Stage Br. 15-16 (if the Fourth Circuit's ruling stands, "many highly qualified practitioners who would otherwise be willing to serve on boards will either resign or refuse to accept office lest they face significant personal antitrust exposure"); State of West Virginia Cert Stage Br. 13 ("In West Virginia, the decision has already hobbled the State's Board of Dental Examiners to the detriment of West Virginia citizens.").

when they are acting pursuant to "clear articulation of a state policy to authorize anticompetitive conduct." *See Town of Hallie*, 471 U.S. at 38-40, 46 & n.10; *see also FTC* v. *Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1010 (2013) ("[S]ubstate governmental entities do receive immunity from antitrust scrutiny when they act pursuant to state policy to displace competition with regulation or monopoly public service." (internal quotation marks omitted)). "This rule preserves to the States their freedom ... to administer state regulatory policies free of the inhibitions of the federal antitrust laws[.]" *Phoebe Putney*, 133 S. Ct. at 1010-1011 (internal quotation marks omitted).

The *Parker* doctrine is simply one concrete instantiation of the broader principle repeatedly affirmed by this Court: State sovereignty is to be respected and the federal government will therefore not be presumed to encroach upon a State's sphere of authority, particularly a State's right to control its own officers. "As Madison expressed it: '[T]he local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere.'" *Printz* v. *United States*, 521 U.S. 898, 920-921 (1997) (quoting The Federalist No. 39, at 245 (Clinton Rossiter ed., 1961)); *see also Gregory* v. *Ashcroft*, 501 U.S. 452, 457 (1991) ("[T]he people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence[.]" (internal quotation marks omitted)); *id.* at 460 ("[It is t]hrough the structure of its government, and the character of those who exercise government authority [that] a State defines itself as a sovereign."); *New York* v. *United States*, 505 U.S. 144, 167 (1992) ("[T]he Framers explic-

itly chose a Constitution that confers upon Congress the power to regulate individuals, not States."). Indeed, because "the States retain substantial sovereign powers under our constitutional scheme," this Court has even required Congress to make its intent to infringe upon a State's sphere of power "unmistakably clear in the language of the statute" before it will alter "the usual constitutional balance between the States and the Federal Government." *Gregory*, 501 U.S. at 460-461 (internal quotation marks omitted).

Of course, respecting "'Our Federalism' ... does not mean blind deference to 'States Rights,'" but it does represent "the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Younger* v. *Harris*, 401 U.S. 37, 44 (1971).

2. In keeping with these basic federalism principles, this Court has made clear that once *Parker*'s clear articulation requirement is satisfied, it will not inquire into whether state actors' purportedly anti-competitive actions are motivated by self-interest. *See Omni*, 499 U.S. at 374, 379; *cf. Parker*, 317 U.S. at 351 ("In a dual system of government in which ... the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.").

In *Omni*, the city of Columbia, South Carolina passed an "ordinance restricting the size, location, and spacing of [new] billboards." 499 U.S. at 368. The provision "obviously benefited" a local, well-established billboard company, while making it difficult for Omni, its new-in-town rival, to compete. *Id.* Omni alleged corruption, arguing that Columbia's city council had

passed the ordinance to fulfill its part of a "longstanding secret anticompetitive agreement" between the well-established billboard company and the city's political leaders. *Id.* at 367 (internal quotation marks omitted). Essentially, the city council's members were accused of a quid pro quo bribery scheme under which they received campaign contributions and other support "in return for" favorable legislation and other preferential treatment. *Id.*; *see also id.* at 378; Pet. 55.

Despite Omni's allegations of wrongdoing, the Court ended its inquiry once it concluded that South Carolina had clearly articulated that Columbia had the authority to enact the ordinance (and therefore that the city was "prima facie entitled to *Parker* immunity"). 499 U.S. at 372-374; *see also id.* at 372 (considering only whether South Carolina granted Columbia the *authority* "to regulate" and "to suppress competition"). This Court firmly rejected "any interpretation of the Sherman Act that would allow plaintiffs to look behind the actions of state sovereigns." *Id.* at 379.

Notably, the *Omni* Court considered and refused to establish additional requirements limiting the ability of local officials to claim *Parker* immunity. The Court rejected a broad "conspiracy" exception to the one-step test on the grounds that requiring an entity to make a showing beyond having the authority to regulate in an anti-competitive manner "would virtually swallow up the *Parker* rule." *Omni*, 499 U.S. at 375 & n.5. Indeed, the Court refused to adopt even a narrowly tailored conspiracy exception that would apply only where a party could show, for example, that the substate entity acted with "'selfish or corrupt motives.'" *Id.* at 376-377. Such a rule, this Court explained, would "go[] far 'to compromise the States' ability to regulate their domestic commerce' and, "arguably even worse[, would] ...

require ... deconstruction of the governmental process." *Id.* at 377 (quoting *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, 471 U.S. 48, 56 (1985)).

Importantly, the Court expressly considered—and declined to create—an objective test that examines whether actions taken by individual state actors are in the "'public' interest." 499 U.S. at 377. The Court refused to create such a test because *Parker* "was not meant to shift ... judgment [in the manifold areas of government regulation] from elected officials to judges and juries." *Id.* This reasoning indicates that the Court intended to leave the determination of what constitutes the public interest in the hands of state and local officials regardless of whether their actions ultimately might serve special interests, such as those of a prominent billboard company. More broadly, this refusal demonstrates that the Court will not peer into the inner workings of local government or use generic concerns about process—such as favoritism arising from the way that local policymakers are selected—as an excuse to deny *Parker* immunity to a state actor.

If anything, the facts of *Omni* presented a more compelling reason than this case to create an exception to the rule that a finding of clearly articulated authority ends the *Parker* inquiry. *See Omni*, 499 U.S. at 367-370; *cf.* Pet. 30-31. There, the Court explained that the city officials who enacted the anti-competitive ordinance had "close relations" with the beneficiary billboard company. *Omni*, 499 U.S. at 367. The "mayor and other members of the city council were personal friends" with the company's majority owner and "the company and its officers occasionally contributed funds and free billboard space to their campaigns." *Id.* Furthermore, there were allegations that the city's leaders had a longstanding practice of using their "'power and resources'" to benefit the

billboard company. *Id.*; *see also id.* at 386 (Stevens, J., dissenting) ("After a 3-week jury trial, a jury composed of citizens of the vicinage found that ... there was indeed such an [anticompetitive] agreement, presumably motivated in part by past favors in the form of political advertising, in part by friendship, and in part by the expectation of a beneficial future relationship[.]"). Indeed, the Court clearly believed that the allegations amounted to accusing individual city council members of bribery. *See id.* at 378 (majority opinion).

In contrast, there are no similar allegations of individual misconduct in this case. "[T]he Board opened an investigation into teeth-whitening services performed by non-dentists" only after receiving formal complaints about the practice. *See State Bd. of Dental Exam'rs*, 717 F.3d at 365. The FTC determined, and the Fourth Circuit agreed, that active supervision was required because *the structure* of the Board—largely made up of practicing dentists who are elected by fellow dentists—raised the specter of self-dealing or favoritism. *See id.* at 368-370; *In re N.C. Bd. of Dental Exam'rs*, 151 F.T.C. at 619, 626-627 ("[T]he determinative factor in requiring supervision is not the extent to which individual members may benefit ... but rather the fact that the Board is controlled by participants in the dental market.").[32] In other words, the articulated concern on

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[32] Indeed, Judge Keenan made clear in her separate concurrence that the Board had reasonable grounds to act as it did. *See* 717 F.3d at 377 ("[T]he record supports the Board's argument that there is a safety risk inherent in allowing certain individuals who are not licensed dentists, particularly mall-kiosk employees, to perform teeth-whitening services."); *see also id.* at 365 (majority opinion) (noting that although whitening services provided by non-dentists "cost far less," they are less effective and "may require multiple applications to achieve results").

which the decisions below are based is a general fear that Board members who are also dentists *might* be self-interested in the Board's enforcement actions.[33] If specific allegations of misconduct were insufficient in *Omni* to trigger a requirement that government officials' actions be subject to active state supervision in order to receive *Parker* immunity, it follows *a fortiori* that there should be no active supervision requirement in this case.

3. The Fourth Circuit's decision is an end run around the core principle of *Omni*—that, when examining the actions of a state actor, the inquiry into whether the *Parker* doctrine is applicable ends once the clear articulation requirement is met. If permitted to stand, the ruling will circumvent this Court's attempt to prevent lower courts from "deconstructi[ng] the governmental process" every time a litigant accuses a substate governmental entity of anticompetitive actions. 499 U.S. at 377.

Omni makes clear that requiring a State to clearly articulate the authority of substate political entities to

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[33] Both the FTC and the Fourth Circuit suggested in passing that the Board may have exceeded its authority by issuing cease-and-desist letters. *E.g.*, 151 F.T.C. at 618, 632-633 n.17; 717 F.3d at 371, 373. But such an accusation—that the Board as an entity arguably went beyond the bounds of its statutory authorization—is not comparable to the allegations in *Omni* that individual members of the city council had acted in an anticompetitive manner due to bribes. Regardless, *Omni* makes clear that the *Parker* doctrine does not require this Court to police whether a state agency stays within the precise metes and bounds of its authority to act: "[I]n order to prevent *Parker* from undermining the very interests of federalism it is designed to protect, it is necessary to adopt a concept of authority broader than what is applied to determine the legality of the [state actor's] action under state law." *Omni*, 499 U.S. at 372.

take actions with possible anticompetitive effect solves concerns about potential corrupt motives. By requiring the State to spell out the metes and bounds of its grant of authority, the Court's rule gives voters sufficient information to hold the State accountable at the polls for grants of authority that go too far, in the judgment of that State's citizenry. Moreover, as this Court has explained, the ultimate purpose of the Sherman Act (and its *Parker* exception) is not to "vindicate[] ... principles of good government." 499 U.S. at 378-379. Other statutes, such as the Hobbs Act, play that role. *Id.* at 379. A judge-created rule that contorts federal antitrust law into a method of ensuring ethical conduct by state actors does not further the statute's purpose. *See id.*; *see also Eastern R.R. Presidents Conf.* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 140 (1961) (the Sherman Act does not "set[] up a code of ethics ... that condemns ... political activity").

B. The Clear Articulation Standard Is The Only Workable Rule, Given The Proliferation Of Boards And Commissions Carrying Out The Daily Workings Of State Government

Given the universal use of boards and commissions, and the significant role they play in carrying out the States' day-to-day functions, the *Omni* test is the only workable standard that balances both deference to the States and concerns about over-reaching by self-interested entities. Active state supervision over boards and commissions whose actions could raise antitrust concerns is simply not practicable.

Because state boards and commissions often operate as state agents, it makes good sense to require a showing that they are acting pursuant to expressly granted state authority before they may receive im-

munity from liability. Indeed, failing to impose a clear articulation requirement would be inconsistent with the spirit of *Parker*, which construed the Sherman Act as being inapplicable to "state action or *official action directed by a state.*" *Parker*, 317 U.S. at 351 (emphasis added); *cf. Town of Hallie*, 471 U.S. at 38 ("Municipalities ... are not beyond the reach of the antitrust laws by virtue of their status because they are not themselves sovereign. Rather, to obtain exemption, municipalities must demonstrate that their activities were authorized by the State[.]").

However, imposing an active supervision requirement is not workable, particularly as the requirement is conceived by the court below. The Fourth Circuit rejected the notion that holding individual board members to a high standard of conduct that prohibits self-dealing or favoritism is adequate to fulfill the active supervision requirement. Specifically, it concluded that the "good government provisions in North Carolina law" and the various "reporting provisions" constraining the actions of the Board's members are too "generic" to meet the requirement. *North Carolina State Bd. of Dental Exam'rs*, 717 F.3d at 370 (internal quotation marks omitted); *supra* pp. 14-18 (discussing existing state-law limits). The panel apparently envisioned that the Board would seek state review, and approval, of each of the cease-and-desist letters that the Board sent to entities that were engaging in unlicensed practice of dentistry. *See State Bd. Of Dental Exam'rs*, 717 F.3d at 370 (rejecting Board's argument that there was active supervision because "the cease-and-desist letters were sent without state oversight and without the required judicial authorization"); *see also In re N.C. Bd. of Dental Exam'rs*, 151 F.T.C. at 629 (FTC determines whether active supervision requirement is met by,

among other things, considering whether the State provided "a written decision on the merits" of the action and "a specific assessment—both quantitative and qualitative—of how the private action comports with the substantive standards established by the legislature.").

The level of supervision required by the Fourth Circuit and the FTC places an impracticable burden on States that depend on hundreds of boards to carry out regulatory and policymaking functions. To be sure, not every state board or commission takes actions that implicate federal antitrust laws, but identifying which do and requiring the boards and commissions to run each action by a (presumably high-ranking) state employee will be both prohibitively time consuming and a drain on state resources. If forced to conform to the Fourth Circuit's rule, the States will have no choice but to reduce their reliance on boards and commissions. Effectively requiring the States to give up the accompanying practical benefits that such entities provide impinges upon the very principles of federalism that the *Parker* doctrine was intended to protect.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

No. 13-534

IN THE

Supreme Court of the United States

THE NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS,
Petitioner,

v.

FEDERAL TRADE COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE NORTH CAROLINA STATE BAR, THE NORTH CAROLINA BOARD OF LAW EXAMINERS, THE WEST VIRGINIA STATE BAR, THE NEVADA STATE BAR AND THE FLORIDA BAR, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amicus The North Carolina State Bar (the "State Bar") was created by the North Carolina General Assembly (the "General Assembly") to protect the public by regulating the practice of law in North Carolina. The State Bar's regulatory functions include formulating and adopting rules of professional ethics and conduct; investigating and prosecuting matters of professional misconduct; preventing or stopping the unauthorized practice of law; distributing compensation to members of the public harmed by professional misconduct; obtaining injunctions to prevent professional misconduct, including freezing the trust accounts of lawyers believed to have misappropriated entrusted funds; and protecting clients of deceased, disbarred or disabled lawyers. N.C. Gen. Stat. §§ 84-23(a), 84-28(f), (j), 84-37 (2011); 27 N.C. Admin. Code 1D .1401-.1403 (2012); *In re Establishment of a Client Security Fund*, 311 N.C. 748 (1984). Extensive safeguards ensure that parties are provided an appropriate and fair process before being subjected to regulatory action.[2]

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[1] Pursuant to Supreme Court Rule 37.3(a), the parties have consented to the filing of this brief, and letters of consent from all parties have been submitted to the Clerk. Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici curiae* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] *See, e.g.*, 27 N.C. Admin. Code 1B .0111(b)-(d), .0112, .0113, .0204 (investigation, notice, and opportunity to respond to allegations of professional misconduct); *id.* 1B .0114-.0116, .0118, .0123 (procedures for discipline and disability hearings); *id.* 1D .0201-.0206, 1E .0313 (procedures before the Authorized Practice Committee); *id.* 1D .0707 (procedures for resolution of disputed

The State Bar's authority is vested in the State Bar Council (the "Council"), which is composed of 61 lawyers elected from judicial districts across North Carolina, four officers (who must be lawyers), and three public members (collectively, the "Councilors"). N.C. Gen. Stat. § 84-17.

The regulatory responsibilities and composition of the State Bar are similar to those of the petitioner the North Carolina State Board of Dental Examiners (the "Dental Board") and numerous other statutorily-created state regulatory bodies, in North Carolina and other states, that are composed entirely or primarily of licensed professionals.

The State Bar of West Virginia, The State Bar of Nevada, The Florida Bar, and the North Carolina Board of Law Examiners join the State Bar as co-*amici*. Each of the state-bar *amici*, like the State Bar, regulates the practice of law through a governing body composed primarily of lawyers. (The Florida Bar's governing body, like that of the State Bar, is elected by other lawyers licensed to practice in the state. *See* R. Regulating Fla. Bar 1-4.1.)

The North Carolina Board of Law Examiners is responsible for the admission and licensure of attorneys to practice in North Carolina, in accordance with rules and regulations that it presents to the Council, and that are then certified to the State Supreme Court. *See* 27 N.C. Admin. Code 1C .0102, .0104. The State Supreme Court retains discretion to decline any rules or regulations it finds to be

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fees); *id.* 1D .0903, .1001 (procedures before Administrative Committee); *id.* 1D .1417-.1419 (procedures for Client Security Fund); *id.* 1D .1801 (hearing and appeal rules of the Board of Legal Specialization); *id.* 1G .0122 (review and appeal of denial of paralegal certification).

inconsistent with the laws governing the State Bar. N.C. Gen. Stat. § 84-21(b). The members of the North Carolina Board of Law Examiners are all lawyers whom the Council elects. *Id.* § 84-24. This brief focuses on the facts concerning North Carolina and its State Bar for illustrative purposes.

SUMMARY OF ARGUMENT

The Fourth Circuit's decision ignores well-established precedent that a state agency that is a "sovereign regulator" constituted under state law and acting pursuant to statutory authorization to displace competition with regulation is a state actor that is entitled to state action immunity from the application of the federal antitrust laws. *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 374 (1991) ("the general language of the Sherman Act should not be interpreted to prohibit anticompetitive actions by the States in their governmental capacities as sovereign regulators"). Instead, the Fourth Circuit found that "when a state agency is operated by market participants who are elected by other market participants, it is a 'private' actor" that is not entitled to state action immunity from federal antitrust laws unless it is "actively supervised" by other state officials. *N.C. State Bd. of Dental Exam'rs v. FTC*, 717 F.3d 359, 370, 375 (4th Cir. 2013). The Fourth Circuit's decision is not only inconsistent with *Parker v. Brown*, 317 U.S. 341 (1943), and its progeny but will expose those charged by the state with regulating professionals—and their board or council members—to antitrust claims (and, potentially, to awards of treble damages and attorney fees, as well as to criminal liability). This exposure to antitrust liability is likely to undermine the functioning of those state regulatory bodies.

The Fourth Circuit's decision threatens an important and sovereign state interest: the choice by a state to regulate state-licensed professionals by state bodies composed primarily of those practicing the same profession (or, at least, ones who are elected by their fellow professionals). By denying these state regulators state action immunity unless they show active supervision by other parts of state government, the decision impairs the ability of state regulators to enforce state laws enacted to protect the public. There are four likely sources of impairment:

- The limited resources available to prosecute lawyer misconduct and to prevent the unauthorized practice of law will be diverted to litigating whether the state bar's action has been actively supervised in a manner sufficient to provide state action immunity.
- State bars will have to defend expensive antitrust actions even though states explicitly authorize the state bars to regulate the conduct being challenged.
- Lawyers will be reluctant to serve as bar councilors for fear of being sued—and of being held individually liable—in treble-damage antitrust actions.
- Councilors who do agree to serve may be deterred from fulfilling their state-authorized enforcement duties against defendants who threaten antitrust claims.

Aside from these severe practical problems, the imposition of potential antitrust liability is not needed to protect or vindicate the rights of aggrieved parties. In allowing the antitrust laws to become a vehicle to

review and challenge state regulation, the decision strikes at the principles of federalism that underlie the state action doctrine.

ARGUMENT

I. THE FOURTH CIRCUIT'S DECISION RADICALLY SUBVERTS THE VALUES OF FEDERALISM ON WHICH THE STATE ACTION DOCTRINE IS FOUNDED.

Not everyone in North Carolina is allowed to practice dentistry. Instead, the General Assembly has restricted competition by requiring dentists to be licensed upon meeting certain qualifications. The General Assembly has also defined the practice of dentistry and included in that definition the removal of "stains, accretions or deposits from the human teeth." *See* N.C. Gen. Stat. § 90-29(b)(2). The scope of the restriction on competition that the General Assembly has imposed is thus explicit.

Unremarkably, the General Assembly has chosen to entrust the regulation of dentistry to a Dental Board composed of the citizens of North Carolina most knowledgeable about the subject: practicing dentists. According to the Federal Trade Commission and the Fourth Circuit, however, the Dental Board and the dentists who serve on it are now subject to treble-damage lawsuits under the Sherman Act precisely because they fulfilled their statutory duty (to prevent unlicensed individuals from removing stains from the human teeth) while serving on a board structured in exact compliance with the governing statutes.

Similarly, not everyone can practice law. Legislatures have restricted who can practice law, set qualifications to obtain a law license, and entrusted state bars such as *amici* to regulate the practice of law and to

exclude from the practice unlicensed individuals and lawyers who have been suspended or disbarred. Many state legislatures have chosen to regulate the legal profession through agencies composed of lawyers elected by their peers or nominated by their peers for selection by another government actor. If the Fourth Circuit's decision stands, those state bars will face Sherman Act liability—even when they are clearly authorized or even mandated by statute to regulate in a manner that displaces competition—simply because a state legislature chose to populate the Council with practicing lawyers as the regulators.

The professions themselves are creatures of state statute. State statutes define what constitutes a profession, and states establish licensing requirements that set forth the qualifications required to be a professional. By interfering with states' sovereign choices concerning the structure, composition, and supervision of professional regulatory boards, and subjecting state regulators to liability in the federal courts, the decision below ignores the states' authority to regulate professions that they created using regulators who have practical experience and expert knowledge of the subject matter they are regulating.

The Fourth Circuit's discussion of federalism presents a circular argument, asserting that subjecting the Dental Board to liability under the Sherman Act presents "no federalism issue" because of the "conclusion that the Board is a private actor under the antitrust laws." *N.C. State Bd. of Dental Exam'rs*, 717 F.3d at 375. To the contrary, the decision to deny immunity to a state regulatory body presents a stark challenge to federalism. This Court has explained that "immunity for state regulatory programs is grounded in our federal structure." *California Retail Liquor*

Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 103 (1980).

The breadth of the Fourth Circuit's holding is illustrated by the fact that, under the court's opinion, when a state chooses to staff a professional regulatory board with working professionals elected by their peers, *no* action taken by that board qualifies for state action immunity, including enforcement actions that are unquestionably authorized by the state's decisions to replace unlimited competition with a regulatory structure. (For example, an action related to the extraction of teeth by unlicensed individuals would not be immune.) The Fourth Circuit concedes that the Dental Board is "a state agency." *N.C. State Bd. of Dental Exam'rs*, 717 F.3d at 364. The General Assembly has charged the Dental Board with addressing all licensing matters, and has empowered the Dental Board to bring an action to enjoin the unlicensed practice of dentistry in North Carolina. N.C. Gen. Stat. § 90-41. Furthermore, the General Assembly not only requires a license to practice dentistry, *id.* § 90-29(a), but also defines the practice of dentistry to include "remov[ing] stains, accretions or deposits from the human teeth," *id.* § 90-29(b)(2), which was the subject of the Dental Board's enforcement action here.

There can be no dispute that the General Assembly, as state sovereign, has chosen to make the Dental Board the state agency with broad and specific power to regulate the practice of dentistry and to constitute the Dental Board with members who are active, practicing dentists. Yet even had the General Assembly expressly required the Dental Board to send cease-and-desist letters with the very wording the

Dental Board used, the opinion below would still deny the Board state action immunity.

The choice to treat a state regulatory body created by and acting pursuant to state statute as a private actor is inconsistent with this Court's rulings on federalism in antitrust cases. "The Sherman Act gives no hint that it was intended to restrain state action or official action directed by a state." *Parker*, 317 U.S. at 351; *see also Omni*, 499 U.S. at 374 ("The rationale of *Parker* was that, in light of our national commitment to federalism, the general language of the Sherman Act should not be interpreted to prohibit anticompetitive actions by the States in their governmental capacities as sovereign regulators.").[3]

Furthermore, the Fourth Circuit's suggestion that municipalities (which are entitled to state action immunity without having to show active supervision, *N.C. State Bd. of Dental Exam'rs*, 717 F.3d at 367) should be afforded a greater degree of deference than should a state body is in conflict with this Court's decisions in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985) and *Omni*. The Fourth Circuit misreads *Town of Hallie*, especially footnote 10, which states:

> In cases in which the actor is a state agency, it is likely that active state supervision would also not be required, although we do not here

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[3] Treating a state agency as a "private actor" would not only potentially deprive state agencies and their officials of state action immunity, but would also cast doubt on the availability of other immunities, such as immunity under the Eleventh Amendment. A clear benefit of the state action doctrine is to avoid sending antitrust litigation, complex as it is, into the thicket of other official immunity doctrines.

> decide that issue. Where state or municipal regulation by a private party is involved, however, active state supervision must be shown, even where a clearly articulated state policy exists.

471 U.S. at 46 n.10 (citing *S. Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 62 (1985)). Footnote 10 contrasted state regulation by a *private party* (such as the rate bureaus in *Southern Motor Carriers*, which were "private associations," 471 U.S. at 52), with arrangements in cases—such as this one—where "the actor is a *state agency*," *Town of Hallie*, 471 U.S. at 46 n.10 (emphasis added). The Fourth Circuit apparently takes this Court's distinction as being without a difference, and declares a State agency *to be* a private party—even if that agency is exercising its core regulatory function pursuant to sovereign State law.

This case deals with the core regulatory function of the Dental Board's policing of the practice of dentistry. It is not for the federal courts to employ the Sherman Act to second-guess the regulatory activities of the states, even if they believe those activities to be misguided or not in complete compliance with state law. As this Court explained with regard to municipal zoning rulings found by a jury to have been the product of a conspiracy, if regulatory decisions are "made subject to *ex post facto* judicial assessment of 'the public interest,' with personal liability of city officials a possible consequence, we will have gone far to 'compromise the States' ability to regulate their domestic commerce.'" *Omni*, 499 U.S. at 377 (quoting *S. Motor Carriers*, 471 U.S. at 56).

In *Hoover v. Ronwin*, 466 U.S. 558, 580 (1984), this Court explained precisely how the principles of

federalism on which *Parker* is founded would be undermined if state entities (there, Arizona's bar examination committee) were subjected to antitrust liability:

> The reasoning adopted by the dissent [in *Hoover*] would allow Sherman Act plaintiffs to look behind the actions of state sovereigns and base their claims on perceived conspiracies to restrain trade among the committees, commissions, or others who necessarily must advise the sovereign. Such a holding would emasculate the *Parker v. Brown* doctrine. For example, if a state legislature enacted a law based on studies performed, or advice given, by an advisory committee, the dissent would find the State exempt from Sherman Act liability but not the committee. A party dissatisfied with the new law could circumvent the state-action doctrine by alleging that the committee's advice reflected an undisclosed collective desire to restrain trade without the knowledge of the legislature. The plaintiff certainly would survive a motion to dismiss—or even summary judgment—despite the fact that the suit falls squarely within the class of cases found exempt from Sherman Act liability in *Parker*.

The Fourth Circuit's decision will cause exactly the harms this Court warned against in *Hoover*. The decision displaces a state's sovereign authority to determine how best to regulate professionals who practice in the state, and undermines the state's judgment that boards composed primarily of licensed professionals, elected by fellow professionals, are, because of their expertise, best qualified and able to

exercise the state's regulatory authority. The decision also intrudes on state sovereignty by essentially compelling states, against their experience, will, and judgment, to impose on professional regulatory boards an unwieldy, intrusive, and unnecessary administrative mechanism to "actively supervise" the boards' actions, so that the boards will qualify for state action immunity and thus remain able to attract qualified professionals to serve on them.

II. THE DECISION BELOW WILL SEVERELY DISRUPT THE ABILITY OF THE STATE BAR AND SIMILAR STATE ENTITIES TO FULFILL IMPORTANT MANDATES OF THE STATE.

The Fourth Circuit holds that "when a state agency is operated by market participants who are elected by other market participants, it is a 'private' actor," and therefore must be actively supervised by other state officials to receive state action immunity. *N.C. State Bd. of Dental Exam'rs*, 717 F.3d at 370, 367 n.4 (while also stating that its "opinion should not be read as precluding" an otherwise undefined category of "more quintessential state agencies," not "composed entirely of private market participants," from "arguing that they need not satisfy the active supervision requirement"). Absent such supervision, no action of a state body run by elected professionals would appear to be reliably protected by state action immunity, even if the conduct is mandated by state statute or state constitution.[4] The decision thus poses a direct

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[4] An example of such a statute is N.C. Gen. Stat. § 84-23(a) (requiring that the Council of the State Bar "shall administer this Article; take actions that are necessary to ensure the competence of lawyers [and] investigate and prosecute matters of professional misconduct").

challenge to a state's ability to organize its regulatory scheme as it sees fit.

It is the states, of course, that license lawyers and many other professionals to practice within their borders, and the states, accordingly, bear the important responsibility to regulate those professionals and protect the public from serious harm they might do. Indeed, in *Hoover*, this Court characterized the regulation of bar applicants as an "essential public service." 466 U.S. at 580 n.34. The regulation of the legal profession is a fundamental state function. As early as 1695, North Carolina disciplined wayward lawyers, with at least three members of the bar "forbidden" from practicing. *See* Ernest H. Alderman, *The North Carolina Colonial Bar*, *in* 13 The James Sprunt Historical Publications 1, 9 (The Univ. of N.C., 1913), https://archive.org/details/northcarolinaco00aldegoog. In 1715, the General Assembly not only adopted legislation such as the Statute of Frauds and statutes of limitations, but it also passed a statute regulating—and limiting competition in—the legal profession, to "prevent the Commissioners and other inferior Officers of the said Court, pleading as Attornies" (sic). Justice James Iredell, *Laws of the State of North Carolina*, 10-14, 22-25 (1791).

To meet this responsibility to protect its citizenry, every state must implement a regulatory regime that has the expertise necessary to identify, analyze, understand, and resolve the issues that arise with respect to the profession being regulated. With respect to lawyers, the General Assembly has determined, understandably, that licensed lawyers are in the best position to implement the State's interest in regulating the legal profession. Likewise, North Carolina and other states have determined that

numerous other professions, such as medicine and dentistry, require regulation by practicing members of the profession. *See, e.g., Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 772 (1999) ("'lay public'" often "'is incapable of adequately evaluating'" issues that require the "specialized knowledge" of professionals) (quoting Barry R. Furrow et al., 1 *Health Law* § 3-1, 86 (1995)); *In re Guess*, 393 S.E.2d 833, 837 (N.C. 1990) ("Certain aspects of regulating the medical profession plainly require expertise beyond that of a layman.").

The General Assembly has also determined that the appropriate means of selecting qualified lawyers who are willing to bear that responsibility is to have them run for election by their peers in the judicial districts in which they practice, where their abilities, character, and reputations are best known. *See* N.C. Gen. Stat. §§ 84-16; 84-18(a), (b). Finally, the General Assembly has chosen not to impose on the State Bar and other expert professional regulatory bodies an intrusive and unnecessary additional layer of oversight that the Fourth Circuit would seem to require. Instead, the State is willing to rely on state agencies to perform their duties in compliance with their statutory authorization and subject to oversight from the three branches of state government.[5] *See* Pet. Br.

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[5] The Supreme Court of North Carolina, for example, retains oversight of the State Bar. *See* N.C. Gen. Stat. § 84-21(b) (requiring that the rules, regulations and amendments adopted by the Council "shall be certified to the Chief Justice of the Supreme Court of North Carolina" and "entered by the North Carolina Supreme Court upon its minutes," but adding that the court may "decline to have so entered" any rules, regulations and amendments "which in the opinion of the Chief Justice are inconsistent" with the laws governing the State Bar); 27 N.C. Admin. Code 1A .1403(c) ("No proposed rule or amendment to a

6-7 (explaining oversight of Dental Board by other branches of government).

The Fourth Circuit's decision fundamentally undermines North Carolina's, and other states', state-mandated professional regulatory regimes and their sovereign interests and choices with respect to bringing the necessary expertise to the regulation of law, dentistry, and numerous other professions. In particular, the Fourth Circuit's erosion of the state action exemption will give litigants against the State Bar and similar agencies every incentive to assert Sherman Act claims to complicate or block enforcement actions, thereby impeding the agencies' ability to protect the public. For example, it is not unusual for disbarred lawyers to try to continue to practice under the guise of being paralegals; some surely will use the Fourth Circuit's decision to attack the efforts of the State Bar to bring enforcement proceedings against them.

Especially disruptive is the likelihood that individual Councilors and board members of similar agencies will be sued for alleged Sherman Act violations. It is already challenging to find lawyers who have earned the trust and confidence of their peers, who are willing to run for election, and who are willing to give up several weeks a year to serve as Councilors, especially in view of the absence of any compensation (aside from a $50 per diem for quarterly Council meetings, *In re Council of the N.C. State Bar* (N.C. March 7, 1996) (on file with the State Bar)). The prospect of facing federal antitrust claims will increase that challenge and will make Councilors—

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rule adopted by the council shall take effect unless and until it is approved by order of the North Carolina Supreme Court.").

and board members of similar agencies—reluctant to take the decisive actions necessary to fulfill their statutory duties, potentially depriving the State not only of their expertise, but also of the substantial cost savings realized by their free service.

In *Hoover*, this Court recognized the seriousness of this chilling effect. Having noted that "[p]etitioners were named as defendants in the suit in their capacity as individual members of" Arizona's bar examination committee, 466 U.S. at 565, the Court wrote:

> Ronwin has brought a suit for damages under the Sherman Act, with the threat of treble damages. There can be no question that the threat of being sued for damages—particularly where the issue turns on subjective intent or motive—will deter 'able citizens' from performing this essential public service.

Id. at 580 n.34 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982)).

The State Bar's exercise of its regulatory authority results in its continual involvement in litigation, as both plaintiff and defendant. As of its April 25, 2014 quarterly meeting, the State Bar was a party to 15 lawsuits in state and federal courts, including one lawsuit seeking to enjoin its imposition of discipline on a lawyer; two lawsuits alleging the State Bar harmed the plaintiffs by failing to impose discipline on lawyers; and three lawsuits, pending in the North Carolina Business Court, seeking to nullify charges of the unauthorized practice of law. In all three Business Court cases, the opposing party asserted claims under the North Carolina Constitution for purported monopolization. *See World Law South, Inc. v. N.C.*

State Bar, No. 13 CVS 11048 (N.C. Super. Ct. filed Aug. 18, 2013); *N.C. State Bar v. Janis Lundquist and Lienguard, Inc.*, No. 11 CVS 7288 (N.C. Super. Ct. filed May 12, 2011); *LegalZoom.com, Inc. v. N.C. State Bar*, No. 11 CVS 15111 (N.C. Super. Ct. filed Sept. 30, 2011). The Fourth Circuit's decision will entice the State Bar's opponents in similar controversies to assert Sherman Act claims in federal court (under 28 U.S.C. § 1337(a)), making it more costly and difficult for the State Bar to protect the public from harm.

State action immunity allows antitrust claims against state agencies to be disposed of at an early stage. The Fourth Circuit's decision, however, would require litigation at least over whether a state bar is a "more quintessential state agency" or the subject of sufficiently active state supervision to warrant state action immunity. If the state bar loses on those issues, the antitrust claim would proceed much further—perhaps to a trial under the complex rule of reason or under the more plaintiff-friendly *per se* or "quick look" tests described in the opinion. *N.C. State Bd. of Dental Exam'rs*, 717 F.3d at 373-74. As this Court noted with concern in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 558 (2007), antitrust litigation is complex and expensive. It threatens defendants with treble damages and awards of attorney fees, 15 U.S.C. § 15, and even raises the prospect of "the criminal liability of public officials," *Omni*, 499 U.S. at 373 n.4. Further, liability insurance may not be available to mitigate the risks and defray the cost of defending these claims. *E.g., Rose Acre Farms, Inc. v. Columbia Cas. Co.*, 662 F.3d 765, 769 (7th Cir. 2011) (excluding antitrust claims from insurance coverage because "[p]articipation in a conspiracy to violate federal antitrust law is both deliberate and criminal").

Instead of applying its limited resources to protect the public, the State Bar will now have to expend those resources litigating antitrust claims.

The State Bar faces a substantial workload in carrying out its responsibilities. Each year, the State Bar handles 1,200 to 1,400 grievances involving lawyer misconduct, 80 to 100 matters involving the unauthorized practice of law, and 40 to 60 contested disciplinary cases. *See, e.g.*, 2013 Annual Report and 2014 April Quarterly Report of the Office of Counsel to the N.C. State Bar, http://www.ncbar.gov/PDFs/office_of_counsel_report.pdf; http://www.ncbar.gov/PDFs/Council_report.pdf. Under the Fourth Circuit's opinion, the State Bar will not be able to send cease-and-desist letters to inform individuals that they are practicing law without a license or in an unauthorized manner without the State Bar taking the risk that it is exposing its Councilors to personal liability under the antitrust laws. The Fourth Circuit's opinion would, as a practical matter, require that the State Bar sue individuals engaging in the unauthorized practice of law without warning rather than writing a cease-and-desist letter that may resolve the matter and avoid the cost and expense of filing lawsuits. By limiting the State Bar's options for deploying its limited resources in a manner that will allow state action immunity, the Fourth Circuit's decision may make it difficult or impossible for the State Bar to handle its volume of cases.

The Fourth Circuit suggests that the State can somehow provide "active supervision." *N.C. State Bd. of Dental Exam'rs*, 717 F.3d at 370. Subjecting state agencies to "active supervision" by the legislature or judiciary, or by state officials who are not "market participants," would be impractical, cumbersome and

inefficient. A redundant bureaucracy would serve little purpose given the separate requirement that "the challenged restraint be one clearly articulated and affirmatively expressed as state policy.'" *Midcal*, 445 U.S. at 105 (quoting *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 410 (1978)). Moreover, because the regulation of professionals frequently involves "the specialized knowledge required to evaluate the services" at issue, beyond the expertise of the "'lay public,'" *Cal. Dental Ass'n*, 526 U.S. at 772 (quoting Furrow et al., at 86), non-practicing state bureaucrats may be unable to provide competent oversight in any event. Nor would it be feasible for the State Supreme Court to provide meaningful oversight of thousands of matters per year.

Adding a new level of bureaucracy also would fail to cure the practical problem that the decision below creates. Under current doctrine, agencies "may not know until after their [conduct] has occurred (and indeed until after their trial has been completed) whether the State's supervision will be 'active' enough." *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 641 (1992) (Scalia, J., concurring). This lingering uncertainty over the outcome of antitrust lawsuits would be enough to dissuade professionals from serving as state officials and would further impair an agency's ability to fulfill its statutory mandate. Thus, even if a state were willing to adopt some sort of regime to supervise its expert regulatory agencies, doing so would fail to dispel the chilling effect, about which this Court warned in *Hoover*, on professionals' willingness to perform "this essential public service." 466 U.S. at 580 n.34.

Moreover, the Fourth Circuit's broad reasoning is not logically limited to agencies whose boards are

composed of *elected* professionals. The Fourth Circuit wrote that "[a]t the end of the day, this case is about a state board run by private actors in the marketplace " *N.C. State Bd. of Dental Exam'rs*, 717 F.3d at 375. This concern extends to *any* state regulatory body "run by" members of the profession being regulated, no matter how those members are selected. The decision does not state or identify how appointed board members and elected board members would behave differently in regulating their peers. (Indeed, the Federal Trade Commission's opinion denying state action immunity to the Board held that "a state regulatory body that is controlled by participants in the very industry it purports to regulate must satisfy both prongs of *Midcal* to be exempted from antitrust scrutiny under the state action doctrine"—*without regard* to the method by which the members were selected. *In re N.C. Bd. of Dental Exam'rs*, 151 F.T.C. 607, 626 (2011)). Thus, numerous state regulatory bodies composed of professionals *appointed* to regulate their peers—including, for example, the North Carolina Boards of Architecture, N.C. Gen. Stat. § 83A-2, General Contractors, *id.* § 87-2, and Medicine, *id.* § 90-2—face the potential loss of the state action exemption, upsetting their functioning as well.

Finally, the Fourth Circuit's decision is vague and unhelpful with respect to exactly the proportion of board members that can be private market participants before its new rule will apply. This ambiguity alone will spawn costly litigation. The court variously indicates that its decision applies to state agencies in which market participants constitute a "'decisive coalition (*usually* a majority),'" *N.C. State Bd. of Dental Exam'rs*, 717 F.3d at 368 (emphasis added) (quoting Phillip E. Areeda & Herbert Hovenkamp, 1A *Antitrust Law: An Analysis of Antitrust*

Principles and Their Application ¶ 227b, 501 (3d ed. 2009)), and to agencies that are "operated by," *id.* at 370, or "run by," *id.* at 375, such market participants. We can only guess about the circumstances in which a "coalition" composed of other than a majority of market participants might be enough to come within the reach of the decision or about what, exactly, it means for an agency to be "operated by" or "run by" such market participants. There is much fodder for litigation here.

Even less helpful to the agencies, and their members, is the Fourth Circuit's observation that "more quintessential state agencies" may still argue "that they need not satisfy the active supervision requirement," *id.* at 367 n.4. The concept of "quint-essentiality" is a new addition to the law of state action immunity, and it is not clear why a state agency created by statute and performing within its statutory mandate would not be seen as "quint-essential" in the first instance. If this comment about "more quintessential state agencies" is intended to suggest a test or standard, then it is too vague to be useful. The decision below does not indicate what factors might bear on quintessentiality. One can only imagine the aggregate cost of the lawsuits that will be required to develop such a list of factors that will provide meaningful guidance.

III. THE DECISION BELOW DISRUPTS THE LONGSTANDING RELIANCE OF STATES ON *PARKER* AND ITS PROGENY IN REGULATING THE PROFESSIONS USING MEMBERS OF THE PROFESSION.

As noted above, North Carolina and many states have chosen to regulate all manner of professions with state agencies that are composed of members of

their professions who often work for no compensation. In arranging their regulatory structures with professionals from the profession being regulated, states have relied on this Court's jurisprudence, and on lower court cases such as *Hass v. Oregon State Bar*, 883 F.2d 1453 (9th Cir. 1989) and *Earles v. State Bd. of Certified Pub. Accountants of Louisiana*, 139 F.3d 1033 (5th Cir. 1998). There have been no contrary cases; the Fourth Circuit's decision, and the FTC's position, represent a reversal that would upset state reliance on previously settled law.

For example, what the Fourth Circuit found dispositive, in concluding that the Dental Board was not entitled to state action immunity, was that the Dental Board was "a state agency operated by market participants who are elected by other market participants." *N.C. State Bd. of Dental Exam'rs*, 717 F.3d at 370. In *Hass*, the board of the Oregon State Bar had exactly those characteristics, being composed of lawyers elected by the other lawyers practicing in the state. 883 F.2d at 1460 n.3. Yet the Ninth Circuit relied on the fact that the lawyers doing the regulating were elected by their peers to conclude that the Oregon State Bar *was* entitled to state action immunity. *Id.* at 1461. The Fourth Circuit attempts to distinguish *Hass* by portraying that decision as being bound by its facts, writing that the Ninth Circuit "merely determined that the particular state agency at issue was more akin to a municipality than a private actor." *N.C. State Bd. of Dental Exam'rs*, 717 F.3d at 369 n.6. However, the facts that ultimately mattered to the Fourth Circuit concerning the Dental Board and the board of the Oregon State Bar are identical, so the cases squarely conflict.

The Ninth Circuit specifically relied on the election of the agency's board as a factor *supporting* the treatment of the bar as a public body entitled to state action immunity, reasoning that the elections served as a "'check' [on] the actions of the [b]oard." *Hass*, 883 F.2d at 1460 n.3. Moreover, the additional reasons the Ninth Circuit gave for treating the Oregon State Bar as a state actor apply with equal force to both the Dental Board and the State Bar. *Hass* emphasized the following features of the Oregon Bar, 883 F.2d at 1460, all of which are shared by the State Bar:

- The Oregon State Bar "is an agency of the state of Oregon organized to regulate the practice of law for the benefit of the public," (*see* N.C. Gen. Stat. § 84-15 (the State Bar is "created as an agency of the State of North Carolina")).
- The governing body of the Oregon State Bar has "nonlawyer members of the public," (*see id.* § 84-17 (the Council shall have "three public members not licensed to practice law in this or any other state")).
- The Oregon Bar's members "must comply with the Code of Ethics enacted by the state legislature to guide the conduct of all public officials" (the North Carolina State Ethics Commission has designated the Council as a board subject to all the provisions of the State Government Ethics Act, *see id.* § 138A-3(1c), http://www.ethicscommission.nc.gov/coverage/coveredBoards.aspx (last visited May 30, 2014)).

Under *Hass,* the State Bar would easily qualify for state action immunity, but under the Fourth Circuit's

decision, it must show active supervision or qualify under the "quintessentiality" standard.

The foreseeable result of affirming the Fourth Circuit's opinion would be that the Federal Trade Commission will be given license to challenge any state regulatory structure in which professionals play a prominent role. States that have relied on *Parker* and *Hass* will be forced to re-examine who they choose to regulate the professions and how they supervise the conduct of state agencies that are composed of professionals. Whether citizens who are not members of a profession will be willing to provide their services essentially for free, as the Councilors do, is an open question. States will also incur additional costs to provide some largely undefined degree of active state supervision to avail themselves of state action immunity. The end result is that states' long and appropriate reliance on *Parker* and the state action immunity doctrine will be disrupted, and states will face the ongoing risk and expense of having their regulatory structures being continually attacked under the antitrust laws.

IV. THE DECISION BELOW MISAPPREHENDS THE AUTHORIZATION REQUIREMENT OF THE STATE ACTION IMMUNITY DOCTRINE AND IGNORES THAT AGGRIEVED PARTIES HAVE ADEQUATE REMEDIES UNDER STATE LAW FOR ANY MISCONDUCT.

The Fourth Circuit recognized that the Dental Board was authorized by State law to bring an action to enjoin the unlicensed practice of dentistry. *N.C. State Bd. of Dental Exam'rs*, 717 F.3d at 364. Although the Fourth Circuit's footnote 9 asserts that "the Board was acting to regulate third parties in a

manner not authorized by state law," that assertion does not appear to be a basis for its holding that "when a state agency is operated by market participants who are elected by other market participants, it is a 'private' actor." *Id.* at 370, 373 n.9. The opinion's summation of its holding goes further than the footnote, suggesting that the relevant question is whether the letters were not just authorized, but *required*: "[a]t the end of the day, this case is about a state board run by private actors in the marketplace taking action outside of the procedures *mandated* by state law to expel a competitor from the market." *Id.* at 375 (emphasis added).

It is unclear whether, and the extent to which, the Fourth Circuit bases its decision to deny state action immunity to the Dental Board on its conclusion that the Dental Board's letters were not contemplated by statute. However, any such reliance where there is clear statutory authority to displace competition with regulation is inconsistent with *Omni* and undermines the Fourth Circuit's entire analysis of the state action immunity doctrine. In *Omni*, this Court rejected the notion that state action immunity is somehow lost to the regulator "whenever the nature of its regulation is substantively or even procedurally defective." *See Omni*, 499 U.S. at 371-73. As the Court explained with regard to the allegedly bribed city council in *Omni*, "in order to prevent *Parker* from undermining the very interests of federalism it is designed to protect, it is necessary to adopt a concept of authority broader than what is applied to determine the legality of the municipality's action under state law." *Id.* at 372.

This conclusion is further underscored by *Town of Hallie* and *FTC v. Phoebe Putney Health System, Inc.*, 133 S. Ct. 1003 (2013). *Town of Hallie* illustrates

that authorization need not be as explicit as the Fourth Circuit's opinion suggests. This Court there explained that, for state action immunity to apply, "[i]t is not necessary for the state legislature to have stated explicitly that it expected the City to engage in conduct that would have anticompetitive effects." *Town of Hallie*, 471 U.S. at 42. Rather, for state action immunity to apply to the City's tying sewage treatment services to the provision of sewage collection and transportation services, "it is sufficient that the statutes authorized the City to provide sewage services and also to determine the areas to be served." *Id.*

More recently, in *Phoebe Putney*, this Court explained that what is required is "a state policy to displace federal antitrust law sufficiently expressed where the displacement of competition was the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature." 133 S. Ct. at 1012-13. *Phoebe Putney* quoted *Omni* to illustrate that a grant of zoning power was sufficient: "'[t]he very purpose of zoning regulation is to displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition' and . a zoning ordinance regulating the size, location, and spacing of billboards 'necessarily protects existing billboards against some competition from newcomers.'" *Id.* at 1013 (quoting *Omni*, 499 U.S. at 373).

This is not a case in which the Dental Board has been given "'simple permission to play in a market.'" *Id.* (quoting *Kay Elec. Coop. v. Newkirk*, 647 F.3d 1039, 1043 (10th Cir. 2011)). To the contrary, "the very purpose" of the authorization of the Dental Board to enforce the state law requiring a license to practice

dentistry, including removing stains from teeth, is to displace competition. The General Assembly's statutory displacement of unfettered competition in dentistry with regulation by the Dental Board is why the holding in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) does not apply. As this Court explained in *Phoebe Putney*, state action immunity did not apply to the Virginia State Bar's adoption of a compulsory minimum fee schedule in *Goldfarb* because the State had not "adopted a policy to displace price competition among lawyers." 133 S. Ct. at 1016. By contrast, the essence of a licensing regulation is to displace competition from those without a licen The Dental Board has thus "been delegated authority to act or regulate anti-competitively," *id.* at 1012, and therefore is entitled to state action immunity for executing that responsibility—including by sending cease-and-desist letters.

The Fourth Circuit also ignored that, even if the Dental Board were to have acted in violation of state law, the imposition of potential antitrust liability is not needed to protect or vindicate the rights of aggrieved parties. To the contrary, this Court has warned explicitly against the "transformation of state administrative review into a federal antitrust job." *Omni*, 499 U.S. at 372. Thus, *Bates v. State Bar of Arizona*, 433 U.S. 350, 363, 383 (1977) upheld the application of state action immunity to the Arizona State Bar's enforcement of a ban on advertising by attorneys, while striking down the ban on other grounds. The Court recognized that subjecting the Arizona State Bar to antitrust liability was not necessary to remedy any alleged departures from state law.

The same is true here. In North Carolina, for example, aggrieved individuals may seek declaratory or injunctive relief or the enforcement of constitutional rights in Superior Court pursuant to N.C. Gen. Stat. § 7A-245. *See, e.g., Gilbert v. N.C. State Bar*, 678 S.E.2d 602, 612 (N.C. 2009) (noting that "the superior court division has original subject matter jurisdiction over constitutional claims"). Many agencies are subject to contested case proceedings under N.C. Gen. Stat. § 150B-23 to resolve claims that those agencies acted improperly or in excess of their authority. Finally, a petition for a writ of mandamus likewise may address any state-law excesses or compel the performance of official duties. *Sutton v. Figgatt*, 185 S.E.2d 97, 99-100 (N.C. 1971).

CONCLUSION

The Fourth Circuit's decision ignores this Court's teachings and the reliance that states have placed on existing law to structure their professional regulatory bodies. The decision will intrude upon the regimes that states have created to enforce laws governing regulated professionals, such as lawyers, doctors, dentists, physical therapists, pharmacists, engineers, and architects. The decision ignores federalism, frustrating the sovereign and commonsense choice of states (i) to entrust regulation of professionals to entities composed primarily of officials who are also "market participants," (and who thus have the requisite expertise), and (ii) not to seek somehow to "actively supervise" those expert bodies with another level of bureaucracy. By disrupting state regulatory regimes and by facilitating antitrust claims by persons subject to regulation, the decision below will impair the ability of the State Bar and other professional regulatory entities to protect the public.

For all of the foregoing reasons, the Fourth Circuit's judgment should be reversed.

Respectfully submitted,

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May 30, 2014

AMICUS CURIAE BRIEF

No. 13-534

In the

Supreme Court of the United States

NORTH CAROLINA STATE
BOARD OF DENTAL EXAMINERS,

Petitioner,

v.

FEDERAL
TRADE COMMISSION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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QUESTION PRESENTED

Whether, for purposes of the state-action exemption from federal antitrust law, an official state regulatory board created by state law may properly be treated as a "private" actor simply because, pursuant to state law, a majority of the board's members are also market participants who are elected to their official positions by other market participants.

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INTEREST AND INTEREST OF AMICI CURIAE[1]

Pursuant to Supreme Court Rule 37.3(a), Pacific Legal Foundation (PLF) and the Cato Institute respectfully submit this brief amicus curiae in support of Respondent. PLF is widely recognized as the largest and most experienced non-profit legal foundation representing the views of thousands of supporters nationwide who believe in limited government, individual rights, and economic liberty. PLF has litigated cases and appeared as amicus curiae in many lawsuits involving the abuse of licensing laws to restrict the right to engage in a common occupation. *See, e.g., Merrifield v. Lockyer*, 547 F.3d 978 (9th Cir. 2008); *Powers v. Harris*, 379 F.3d 1208 (10th Cir. 2004), *cert. denied*, 544 U.S. 920 (2005); *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002). PLF attorneys have also published scholarly research on issues relating to occupational licensing abuse and government immunities from antitrust laws. *See, e.g.*, Timothy Sandefur, *The Right to Earn a Living* 50-63 (2010); Timothy Sandefur, *A Public Convenience and Necessity and Other Conspiracies Against Trade: A Case Study from the Missouri Moving Industry*, 24 Geo. Mason U. C.R. L.J. 159 (2014).

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato has published extensive scholarly research on antitrust law and the constitution's protections for economic liberty. *See, e.g.*, Edwin S. Rockefeller, *The Antitrust Religion* (2007); Dominick T. Armentano, *Antitrust Policy: Reform or Repeal?* (Cato Policy Analysis No. 21, Jan. 18, 1983). Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty.

This case is of central concern to PLF and Cato because regulatory agencies so frequently exercise their powers to exclude legitimate economic competition for the benefit of politically well-connected insiders, thereby infringing on constitutional protections for the right to compete. PLF and Cato believe their legal and public policy experience will assist this Court in its consideration of the merits of this case.

SUMMARY OF ARGUMENT

This Court should presume strongly against granting state-action immunity in antitrust cases. It makes little sense to impose powerful civil and criminal punishments on private parties who are deemed to have engaged in anti-competitive conduct, while exempting government entities—or, worse, private parties acting under the government's aegis—when they engage in the exact same conduct. As Chief Justice Burger observed, if the antitrust laws were "'meant to deal comprehensively and effectively with the evils resulting from contracts, combinations

and conspiracies in restraint of trade,'" then it is "wholly arbitrary" to treat government-imposed restraints of trade as "beyond the purview of federal law." *City of Lafayette, La. v. Louisiana Power & Light Co.*, 435 U.S. 389, 419 (1978) (opinion of Burger, C.J.) (citation omitted).

This Court has declared that the antitrust laws are concerned with "the result[s]" and not "the form of the combination or the particular means used," so that it is "not of importance whether the means used to accomplish the unlawful objective are in themselves lawful or unlawful." *American Tobacco Co. v. United States*, 328 U.S. 781, 809 (1946). Thus there can only rarely be any justification for treating a state-approved restraint of trade differently from one that lacks government's imprimatur.

Antitrust immunity for private parties who act under color of state law is especially problematic, given that anticompetitive conduct is *most* likely to occur when private parties are in a position to exploit government's regulatory powers. *See Hallie v. City of Eau Claire*, 471 U.S. 34, 47 (1985) ("[w]here a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State."). And where, as here, private parties have an explicit conflict of interest when put in charge of state policy, the Court should be especially wary of according those parties immunity. The Board of Dental Examiners is made up of members of the trade who privately benefit from excluding potential competitors from the market, and who answer to other members of the trade who share that interest. For the state to empower them to restrict entry into the trade

obviously brings about the danger Justice Stevens warned about in *Hoover v. Ronwin*, 466 U.S. 558, 584 (1984) (Stevens, J., dissenting): it empowers private parties to exploit licensing laws "to advance their own interests in restraining competition at the expense of the public interest."

In light of these dangers, this Court should only apply *Parker* immunity to private parties acting under color of state law (1) where the state itself has commanded the restraint of trade in question, (2) where the state actively supervises the private parties applying that restraint, and (3) where the restraint substantially advances an important state interest.

ARGUMENT

I

LICENSING LAWS ARE FREQUENTLY ABUSED BY EXISTING INDUSTRIES IN VIOLATION OF THE CONSTITUTIONAL RIGHT TO EARN A LIVING

Among the essential rights guaranteed under the Constitution is the right to earn a living at a trade or profession without unreasonable interference from the government. *Greene v. McElroy*, 360 U.S. 474, 492 (1959).

This right is "objectively, deeply rooted in this Nation's history and tradition." *Washington v. Glucksberg*, 521 U.S. 702, 703 (1997). As long ago as the early seventeenth century, English courts were confronted with the exact problem presented in this case: existing practitioners using the power of the state to prohibit new competition from entering the

marketplace. This barred entrepreneurs from earning a living and forced consumers to pay more, for fewer options. English courts regularly struck down these cartels, holding that licensing regulations were valid only if they protected public, and not private, interests. *See, e.g.*, *The Case of the Bricklayers*, (1624) 81 Eng. Rep. 871, 872 (K.B.); *The Ipswich Tailors' Case*, (1615) 77 Eng. Rep. 1218, 1219 (K.B.).

"[T]he King," declared the court in *The City of London's Case*, (1610) 77 Eng. Rep. 658, 663 (K.B.), "may erect *guildam mercatoriam, i.e.*, a fraternity or society or corporation of merchants, to the end that good order and rule should be by them observed for the increase and advancement of trade and merchandise, *and not for the hindrance of it*." (emphasis added). These decisions formed the basis of the Whig anti-monopoly tradition, and led to the enactment of the British Statute of Monopolies, 1623, 21 Jac. 1, c. 3 (Eng.), an early model for American antitrust legislation. *See further* William Letwin, *Law and Economic Policy in America: The Evolution of the Sherman Antitrust Act* 22-32 (University of Chicago Press 1981) (1965).

Sadly, as this case demonstrates, cartels of existing business still use licensing laws to protect themselves against competition by newcomers. By staffing licensing and regulatory agencies with established practitioners who have a vested private interest in excluding competition, states routinely enable those firms to use government power to restrict entrepreneurs' right to earn a living, increase prices, and limit consumer choice. While Professors Aaron Edlin and Rebecca Haw call these entities "the new cartels," *Cartels by Another Name: Should Licensed*

Occupations Face Antitrust Scrutiny? 162 U. Pa. L. Rev. 1093 (2014), there is nothing new about it: the actions at issue in this case are actually among the oldest abuses of government power known to our constitutional tradition.

This Court has repeatedly held that the Constitution forbids states from blocking people from earning a living pursuant to licensing restrictions that lack a reasonable connection to the person's fitness or capacity to engage in that trade. *See Schware v. Bd. of Bar Exam'rs*, 353 U.S. 232, 238-39 (1957); *Dent v. West Virginia*, 129 U.S. 114, 122 (1889); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 278 (1932). But because trade cartels that operate under the aegis of the state are often granted antitrust immunity under *Parker v. Brown*, 317 U.S. 341 (1943), the very entities most likely to create monopolies and engage in the most harmful forms of anticompetitive behavior are shielded from antitrust scrutiny.

To emphasize: *the state's sovereign power is an essential tool by which private actors restrain trade.* Existing firms only invest time and resources in obtaining and enforcing barriers to entry because they stand to recoup those costs through above-market prices that are made possible only by government's power to prohibit new firms from competing against them. Without that power to exclude, new firms could enter the market whenever existing firms fixed prices, reduced quality, or tried to limit consumer choices. *See* Dominick T. Armentano, *Antitrust and Monopoly: Anatomy of a Policy Failure* 42 (2d ed. 1990) ("Government franchises, certificates of public convenience, licenses . are all instances of monopoly power for the firms protected from open

competition [G]overnment, and not the free market, would be the actual source of resource-misallocating monopoly.").

By way of analogy, this Court held in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), that predatory pricing schemes are exceedingly unlikely to work unless some barrier to entry enables the alleged predator to prevent new firms from entering the industry as soon as the predator tries to raise prices above market rates. *Id.* at 227-28. If "new entry is easy," *id.* at 226, new firms will start up and prevent the predator from recouping its losses, thus defeating the predatory pricing scheme. *See also* Frank H. Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U Chi. L. Rev. 263, 272 (1981) ("barriers to entry and postpredation monopoly are necessary to recoupment."); Stephen Breyer, *Regulation and Its Reform* 32 (1982) ("regulation can make predatory pricing easier, since it often provides the barriers to entry necessary for a potential predatory pricer to succeed."). In the same way, barriers to entry are an invaluable tool in the hands of established firms seeking to exclude rivals for self-interested purposes.

Exempting private actors from antitrust liability whenever they enlist the power of the state in their anticompetitive efforts is simply unreasonable. Economists long ago recognized that existing firms try to persuade government to raise barriers to entry in a trade so as to protect themselves against competition. "The *justification*" for such laws, wrote Milton and Rose Friedman,

> is always the same: to protect the consumer. However, the *reason* is demonstrated by observing who lobbies for the imposition or strengthening of licensure. The lobbyists are invariably representatives of the occupation in question rather than of the customers [I]t is hard to regard altruistic concern for their customers as the primary motive behind their determined efforts to get legal power to decide who may be a plumber.

Free to Choose 240 (rev. ed. 1980). Or, as Sir Edward Coke put the point four centuries ago, businesses seeking licensure are frequently like a man rowing a boat: "they look one way, and row another: they pretend public profit, intend private." Quoted in R.H. Coase, *The Firm, The Market, and The Law* 196 (1988) (spelling modernized). Thus allowing states to immunize private conduct from antitrust liability whenever that conduct involves the use of state regulatory power makes no sense.

If "[t]he antitrust laws were enacted for 'the protection of *competition*, not *competitors*," *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 352 (1990) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962) (emphasis in original)), and were meant to "embod[y]" the "fundamental national values of free enterprise and economic competition," *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1010 (2013), then private parties acting with state authority should be particularly suspect. It is precisely by exploiting state power that existing firms engage in anticompetitive behavior. "When a group of competitors or a single firm influence governmental

process for the purpose of restraining trade or monopolizing the market, the statutory objectives of the [antitrust laws] are placed in serious jeopardy." Gary Minda, *Interest Groups, Political Freedom, and Antitrust: A Modern Reassessment of the Noerr-Pennington Doctrine*, 41 Hastings L.J. 905, 909 (1990).

Examples of trade associations using state laws to restrict their own competition—for no genuine consumer benefit—abound. For example, in the 1980s, the American Society of Interior Designers (ASID) began a campaign to obtain regulations in various states which would require a government license to engage in the trade of interior design—*i.e.*, advising clients on how to decorate their homes or businesses more attractively. There is, of course, no realistic danger to the public from unlicensed persons advising clients on where to place tables and what color drapes to buy. Yet ASID spent some $275,000 on the effort to obtain licensing laws in 1986, *see Move to License Interior Designers*, N.Y. Times, Jan. 23, 1986, at C3, *available at* 1986 WLNR 825327, and since then, it has continued to spend handsomely in its push for licensing laws. *See generally* Dick M. Carpenter II, Institute for Justice, *Designing Cartels: How Industry Insiders Cut Out Competition* 9-24 (2007).[2] Today, 19 states prohibit people from calling themselves "interior designers" without government permission, *id.* at 7, and three states and the District of Columbia forbid a person from advising clients on how to decorate a home or business without first holding a license. *Id.* Obtaining such a license is expensive and time-consuming, so licensing laws typically block economic

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[2] *Available at* http://www.ij.org/images/pdf_folder/economic_liberty/Interior-Design-Study.pdf (last visited June 25, 2014).

opportunity to precisely those middle- or lower-income applicants most in need of such opportunity. *See* David E. Harrington & Jaret Treber, Institute for Justice, *Designed to Exclude: How Interior Design Insiders Use Government Power to Exclude Minorities & Burden Consumers* (2009).[3]

Another example is Certificate of Public Convenience and Necessity (CPCN) laws, which bar competition in such industries as household goods moving, solely to protect established insiders against competition. *See generally* Sandefur, *Public Convenience*, *supra*, at 159. Under a typical CPCN law, anyone wishing to enter a trade must first notify existing firms and give them the opportunity to object to the opening of a new business. When an objection is filed, the applicant must prove to a government agency that new competition is warranted—an obstacle that is usually extremely difficult to overcome, in no small part due to the fact that most such laws provide no criteria or only extremely vague criteria for proving this. Existing firms use their objection power as a "competitor's veto" to bar new firms from entering the trade—without any concern for public health and safety, or an applicant's skills, qualifications, or experience.

For instance, Missouri's CPCN law was systematically exploited by existing moving companies to block competition against them between 2005 and 2010. *See id.* at 180.[4] Of the 17 persons who sought

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[3] *Available at* https://www.ij.org/images/pdf_folder/economic_liberty/designed-to-exclude.pdf (last visited June 25, 2014).

[4] Missouri's law was the target of a 42 U.S.C. § 1983 lawsuit, (continued...)

permission to operate a statewide moving company during those years, all were protested by one or more existing firms, who stated as the sole basis for objection that allowing a new moving company would cause "diversion of traffic or revenue" from them. *Id.* at 181. None ever identified any concern relating to public safety, and no objection was ever filed by a consumer. *Id.* Yet the state's Transportation Department routinely denied even fully qualified applicants the right to start moving businesses, solely because existing firms did not desire competition. *See id.* at 183-84. The state repealed its CPCN law in 2012, but this history demonstrates how empowering existing firms to prohibit potential competition established a cartel that harmed entrepreneurs by denying them the right to earn a living, and harmed consumers by raising prices and restricting the availability of services—all for exclusively private benefit.

The District Court for the Eastern District of Kentucky made almost identical findings recently in a case involving that state's CPCN requirement for moving companies. *Bruner v. Zawacki*, No. 3:12-57-DCR, 2014 WL 375601 (E.D. Ky. Feb. 3, 2014). Between 2007 and 2012, 39 persons applied for permission to operate moving companies. *Id.* at *2. Existing companies collectively filed 114 protests against those applications, *id.*, but no protest ever identified any concerns relating to an applicant's safety, honesty, or consumer service record, *id.* at *6,

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[4] (...continued)
Munie v. Koster, No. 4:10-cv-01096 AGF (E.D. Mo. filed June 18, 2010), which was dismissed as moot when the state repealed the law after oral argument on the summary judgment motion.

and no protest was ever filed by a consumer. *Id.* at *2. The state routinely denied Certificates to experienced, fully-qualified movers, simply because existing firms used their veto power to block competition. *Id.* at *7. As the District Court explained when declaring the law unconstitutional, the government was "providing an umbrella of protection for preferred private businesses while blocking others from competing, even if they satisfy all other regulatory requirements." *Id.* at *6.[5]

Given that private parties "may be presumed to be acting primarily" for self-interested reasons even when wielding state regulatory powers, *Hallie*, 471 U.S. at 45, extending state-action antitrust immunity to those parties is likely to exempt precisely those actions *most* likely to constitute monopolistic behavior.

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[5] The Federal Trade Commission has taken antitrust action against some of these state-established cartels on grounds other than licensing. For example, in *In re. Kentucky Household Goods Carriers Ass'n, Inc.*, 139 F.T.C. 404, 405 (2005), *aff'd*, 199 Fed. Appx. 410 (6th Cir. 2006), the FTC found that the state's household goods movers had engaged in "unlawful horizontal price fixing," notwithstanding the Association's effort to claim *Parker* immunity. The FTC found that although the state did regulate prices to ensure that they are "just and reasonable," the state did not actively supervise the prices that were established, never required submission of data supporting the set prices, and had established no standard for determining what rates would be permissible. *Id.* at 408. The FTC therefore found that state supervision over rate setting was "exceedingly limited," *id.* at 421, and that the state's moving companies were exploiting the statutory framework to engage in cartel behavior. Indeed, the state was literally "rubber-stamping" the private association's decision to set prices in the industry. *Id.* at 428; *see also id.* at 435 ("year after year, the [state] has allowed the [private movers] . . to raise [legally imposed] rates with virtually no examination of the merits of these rates. The brunt of these anticompetitive practices is being borne by consumers in Kentucky.").

This Court should continue to presume strongly against such immunity. *Phoebe Putney*, 133 S. Ct. at 1016-17 (rejecting invitation to presume in favor of immunity).

II

THIS COURT SHOULD REFUSE STATES THE POWER TO IMMUNIZE ANTICOMPETITIVE ACTIONS FROM ANTITRUST LIABILITY BY MERE FIAT

To permitting states to extend antitrust exemptions at will to private parties would violate the Supremacy Clause, by allowing states to essentially veto the applicability of a federal statute—the text of which does not give states any such power. *Parker*, 317 U.S. at 351 (states cannot "give immunity to those who violate the Sherman Act by authorizing them to violate it."). It would also contradict the broad wording of the antitrust laws themselves, which apply to "any" and "all" restraints of trade, presumptively including those imposed by government bodies. *See U.S. Postal Serv. v. Flamingo Indus. (USA) Ltd.*, 540 U.S. 736, 744-45 (2004).

Allowing states expansive power to exempt private actors from antitrust laws would also disrupt national economic policy by encouraging a patchwork of state-established entities licensed to engage in cartel behavior. This would disrupt interstate investment and consumer expectations, and would have spillover effects across state lines. *See Lafayette*, 435 U.S. at 408 (plurality opinion) ("If municipalities were free to make economic choices counseled solely by their own parochial interests and without regard to their anticompetitive effects, a serious chink in the armor of

antitrust protection would be introduced at odds with comprehensive national policy.").

Finally, broad state power to grant antitrust immunity risks rewarding the harmful, private exploitation of the legislative process. Just those private actors who *succeed* in capturing the state's regulatory system and abusing it to create anticompetitive cartels would enjoy immunity for activities that are contrary to the public interest. As Professors Edlin & Haw observe, *supra*, at 1143,

> [s]ound public policy requires that any consortium of competitors be supervised by disinterested state agents, be subject to antitrust laws, or both. That the consortium of competitors is called a state board and given power by the state to regulate its profession does not make it more trustworthy. The grant simply makes the board more powerful and therefore more dangerous.

That is precisely why this Court has declared that state governments may not "thwart[]" the "national policy in favor of competition" by "casting a gauzy cloak of state involvement" over the self-interested cartel behavior of private actors. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106 (1980).

This Court has sought to prevent a too-liberal application of *Parker* immunity by employing the "clear articulation of state policy" and "active supervision" tests. But these are "purely procedural requirements" which are too easily satisfied by self-serving ipse dixits by the very entities to which immunity should only

rarely be granted. Peter Hettich, *Mere Refinement of the State Action Doctrine Will Not Work*, 5 DePaul Bus. & Com. L.J. 105, 118-34 (2006). Instead, this Court should extend *Parker* immunity to private entities only (a) where the state compels the restraint in question, (b) where the private parties are actively supervised by the state, and (c) where the restraint substantially advances an important government interest.

A. *Southern Motor Carriers* Should Be Overruled and Antitrust Immunity Granted Only Where State Law Compels the Restraint in Question

Parker and its progeny are premised on the understanding that there is "nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." *Parker*, 317 U.S. at 350-51. Such immunity is therefore a narrow exception to the overall national policy declared in the antitrust laws.

Prior to this Court's decision in *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985), this and other courts understood *Parker* to mean that only where state law specifically compelled the restraint in question, could a private party be exempt from the antitrust laws for imposing or engaging in that restraint. *See, e.g., Cantor v. Detroit Edison Co.*, 428 U.S. 579, 592-93 (1976) ("state authorization, approval, encouragement, or participation in restrictive private conduct confers no antitrust immunity."). In *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), for example, the Court held that antitrust liability would apply to a private entity that imposed dues assessments on attorneys which

constituted a price-fixing arrangement, because "the threshold inquiry in determining if an anticompetitive activity is state action is whether the activity is required by the State acting as sovereign." *Id.* at 790. Since no statute or regulation imposed a restraint on trade, the state bar could not use state sovereignty to immunize itself from antitrust liability. "The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members." *Id.* at 791.

But *Southern Motor Carriers* declared that a state command displacing competition was *not* required before this Court would grant antitrust immunity to private parties. Instead, private parties could act with impunity in ways that would otherwise violate federal antitrust laws so long as state law "expressly *permits*, [even if it does] not compel, anticompetitive conduct." 471 U.S. at 61. In other words, states can allow private parties to engage in price fixing and other illegal activities so long as the state "intends to adopt a permissive policy" which allows such conduct. *Id.* at 62.

This holding grants states far broader power to confer immunity than either federal statutes or *Parker* warrants. A "permissive policy" simply means that a state can proclaim private parties immune from statutes that purport to set national economic policy, by a *pro forma* declaration—precisely what *Parker* declared impermissible when it held that states could not "give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." 317 U.S. at 351.

Limiting antitrust immunity to cases where states *require* anticompetitive conduct would encourage transparency and accountability to voters: that is, states would only be able to grant immunity to private parties when they express anticompetitive policies in the clearest terms. "Neither federalism nor political responsibility is well served by a rule that essential national policies are displaced by state regulations intended to achieve more limited ends." *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992). If states "choose to displace the free market," antitrust law should at least ensure that it is "clear that the State is responsible for the price fixing it has sanctioned and undertaken to control." *Id.* *Southern Motor Carriers*, by contrast, dilutes *Parker* immunity so as to allow states to grant it to private parties by simply gesturing in the direction of anticompetitive policy. This encourages states to couch their economic policies in vague terms, which give regulatory agencies the broadest possible power—and enable elected officials to take credit for the successes those agencies achieve, while plausibly disclaiming their failures. This reduces transparency and accountability, and creates an incentive for government to delegate its power to private entities—always a dangerous prospect. *Cf.* *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973) ("those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes.").

Nor does a state's vague "permissive policy" give clear instructions to the private parties who wield the power to impose anticompetitive restrictions contrary to federal antitrust policy. A "permissive policy" does not specify what acts the private party is empowered to take; thus the party can devise its own policies without concern for whether they reflect precisely the

aspect of competition the state meant to cut short. *See* John F. Hart, *"Sovereign" State Policy and State Action Antitrust Immunity*, 56 Fordham L. Rev. 535, 571 (1988) ("The displacement-of-competition standard, in supporting immunity for a substantial class of restraints instituted by state agencies or local government that cannot plausibly be said to implement state policy, defeats the Court's objective of confining immunity to those restraints that implement state policy."). Where a state grants only a general authorization to engage in anticompetitive conduct, its agencies—or private parties claiming to act in the state's name—can exercise "unguided discretion" to choose the extent to which competition ought to be displaced in an industry. C. Douglas Floyd, *Plain Ambiguities in the Clear Articulation Requirement for State Action Antitrust Immunity: The Case of State Agencies*, 41 B.C. L. Rev. 1059, 1106 (2000). In such a case, "it is illusory to view the state legislature as the 'politically accountable' source of a state policy that in fact has been adopted by the agency itself." *Id.*

The *Southern Motor Carriers* Court sought to deflect this problem by requiring "evidence [that] *conclusively shows* that a State intends to adopt a permissive policy," 471 U.S. at 62 (emphasis added), thus apparently preserving a clear-articulation requirement. But this does little to diminish the broad power that the case gave to states to nullify federal antitrust law. Vague "permissive policies" are not made less vague by the fact that the law "conclusively shows" that the state intends to adopt a vague policy. An instruction like "engage in whatever anticompetitive conduct you choose" would conclusively delegate broad power to a private party, but would not define the contours of the policy itself. It would only

"conclusively show" that the state intends to cast its "gauzy cloak" over the anticompetitive conduct of private parties. *Midcal*, 445 U.S. at 106.

Worse, the "permissive policy" rule is irreconcilable with the strong presumption against antitrust immunity that has been a mainstay of this Court's jurisprudence from the beginning. The "permissive policy" rule encourages courts to "use [their] imagination liberally in determining whether particular anticompetitive conduct was a foreseeable or logical result of the regulatory delegation," and grant immunity when it concludes in the affirmative. Thomas M. Jorde, *Antitrust and the New State Action Doctrine: A Return to Deferential Economic Federalism*, 75 Cal. L. Rev. 227, 244 (1987). Yet this Court has emphasized that "state-action immunity is disfavored, much as are repeals by implication." *Ticor*, 504 U.S. at 636; *accord, Phoebe Putney*, 133 S. Ct. at 1010. Allowing private parties to assert immunity from the antitrust laws on the grounds that the state intends to permit violation of those laws is just the sort of immunity-by-implication that this Court has foresworn. In *Cmty. Commc'ns Co., Inc. v. City of Boulder*, 455 U.S. 40, 55 (1982), this Court rejected an almost identical effort by municipalities to assert immunity in cases where the state had adopted a permissive policy with regard to cities. For the same reason, this Court should require more than a mere "permissive policy" before allowing self-interested private parties to engage in anticompetitive conduct under color of state law.

Finally, *Southern Motor Carriers* justified its broader authorization of immunity on the grounds that limiting immunity to cases where state laws actually

compel the anticompetitive conduct would "reduce[] the range of regulatory alternatives available to the State." 471 U.S. at 61. But this is surely insufficient reason, given that many federal laws reduce the states' range of regulatory alternatives, and, as this Court has asserted, "[t]he antitrust laws reflect a basic *national* policy favoring free markets over regulated markets." *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 388 (1991) (emphasis added); *see also Lafayette*, 435 U.S. at 413 (plurality opinion) (antitrust laws "reflect[]" the "Nation's economic goals."). "When a federal statute condemns an act as unlawful," any "conflicting state law and policy must yield" to "the federal statute and policy." *Sola Elec. Co. v. Jefferson Elec. Co.*, 317 U.S. 173, 176 (1942). And as this Court concluded in *Ticor*, 504 U.S. at 636, a consistent presumption against immunity from the antitrust laws actually *helps* states to craft economic policies: "By adhering in most cases to fundamental and accepted assumptions about the benefits of competition within the framework of the antitrust laws, we increase the States' regulatory flexibility."

To the extent that *Parker* immunity is meant to reflect federalism concerns, those considerations are sufficiently addressed by a rule that allows immunity to private parties only where their anticompetitive conduct is compelled by the state. Such a rule would accommodate state autonomy while more effectively ensuring compliance with federal law and preventing the private abuse of state regulatory powers.

The lenient rule of *Southern Motor Carriers* warrants one critic's conclusion in that "the ideology of federalism has displaced a national model of competition for one favoring state-based resolutions."

E. Thomas Sullivan, *Antitrust Regulation of Land Use: Federalism's Triumph Over Competition, the Last Fifty Years*, 3 Wash. U. J.L. & Pol'y 473, 511 (2000). Whatever one's opinion of antitrust law in general, there is no justification for allowing states broad latitude to disregard federal law and erect private cartels with only vague instructions and loose oversight. *Parker* immunity should be extended to private parties acting under color of state law only where state law requires the restraint of trade in question. To the extent that *Southern Motor Carriers* is to the contrary, it should be overruled.

B. Private Parties Should Be Held Immune Only Where the State Actively Supervises Their Application of the Restraint in Question

This Court has long held that private parties can assert *Parker* immunity only where their anticompetitive actions are not only on behalf of the state, but are actively supervised by state officials. This active supervision requirement is intended to prevent "purely parochial interests" from "disrupt[ing] the Nation's free-market goals" under the color of state law. *Lafayette*, 435 U.S. at 416 (plurality opinion). State supervision cannot be purely formalistic, but must be genuine—states must exercise "sufficient independent judgment and control" that the anticompetitive acts in question are the "product of *deliberate* state intervention," *Ticor*, 504 U.S. at 634 (emphasis added), instead of the private self-interest of existing firms.

The Petitioners argued below that the active supervision requirement should not apply to them because North Carolina law requires that the Dental

Board be made up of practicing dentists; thus as a state agency, it should be treated like a municipality, which need not prove active supervision to establish immunity.

But the reason municipalities are not required to demonstrate active supervision before being granted immunity is that there is less danger that a municipality will engage in self-interested conduct under the color of state policy in violation of antitrust law. *Hallie*, 471 U.S. at 47. The opposite is obviously the case here: not only is the Board made up almost entirely of licensees who have a substantial private interest in excluding competition from teeth-whiteners, but as the court below noted, the agency acted not on complaints of consumers, but of other existing dentists, concerned primarily about economic competition against them. *N.C. State Bd. of Dental Exam'rs v. FTC*, 717 F.3d 359, 374 n.12 (4th Cir. 2013). *See also In re N.C. Bd. of Dental Exam'rs*, No. 9343, 2011 WL 6229615, at *9 (F.T.C. Dec. 7, 2011) (FTC finding that complaints were primarily from existing dentists opposed to competition).

In their brief in support of the petition for certiorari, amici curiae West Virginia, *et al.*, argue that states regularly staff their regulatory agencies with practicing members of trades and professions that they are charged with regulating. Br. Amicus W. Va., et al., at 11-12. According to the states, this is because "state legislators have [good] reason[] to choose to rely on the specialized knowledge of professionals to regulate their own market." *Id.* at 11. Yet the brief makes no mention of the obvious conflict of interest involved in such a situation, and says nothing about the danger of

state authority being exercised in the service of parochial interests.

Nor is the argument in favor of stacking such boards with existing licensees particularly compelling. State regulatory agencies can obtain the "specialized knowledge of professionals" without establishing a system that merely rubber-stamps the often self-interested assertions of these professionals. One can easily imagine such alternatives. *See* Edlin & Haw, *supra*, at 1155. The agency could be staffed by independent state agencies who invite comment and input from professionals while retaining final decision-making authority in official hands. (Agencies already routinely do this.) Or, agencies could be made up of retired members of the profession, or could include existing members without their making up the majority of the board. States could adopt private certification requirements, an alternative to statutory licensing that allows *consumers* to choose what services to purchase and what practitioners to patronize. These and other "active supervision" alternatives would easily accommodate the state's legitimate interests in obtaining specialized knowledge while also resisting the danger of private exploitation of public power.

By ignoring the obvious conflict of interest in vesting existing market participants with the power to veto potential competitors, the states essentially seek a rule that would give states *carte blanche* to erect cartels in any number of industries. The Missouri and Kentucky mover licensing laws discussed above, Section I, are again instructive here. In those cases, states also claimed that allowing existing firms the power to essentially veto their own competition was a

necessary means of obtaining the specialized knowledge of industry professionals. But these professionals far more often exploited their role in the process to block competition, rather than to supply information to the regulatory agency. *See, e.g.*, *Bruner*, 2014 WL 375601, at *7 ("As the statute is applied, the only 'information' supplied is that no new competition is wanted."); Sandefur, *Public Convenience*, *supra*, at 181. The recent history of the dental industry's efforts to block teeth whiteners from competing economically reveals that the same anticompetitive dynamics are at work here. *See generally* Angela C. Erickson, *White Out: How Dental Industry Insiders Thwart Competition from Teeth-whitening Entrepreneurs* (2013).[6]

One need not deny that states may have an interest in obtaining the "specialized knowledge of professionals" to see that the danger of self-interested action by regulatory agencies dominated by private actors is a real one—and that the active supervision requirement allows states to obtain needed knowledge while ensuring compliance with the antitrust statutes. As this Court explained in *Patrick v. Burget*, 486 U.S. 94, 101 (1988), the active supervision requirement is designed to allow states flexibility in their regulatory policies within the boundaries of federal law: it

> requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy. Absent such a program of supervision, there is no

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[6] *Available at* http://www.ij.org/images/pdf_folder/other_pubs/white-out.pdf (last visited June 25, 2014).

> realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests.

In short, the states' interest in obtaining information from industry insiders does not warrant blanket immunity from the antitrust laws.

C. Antitrust Immunity Should Apply Only to Restraints That Substantially Advance an Important State Interest

The compulsion and active supervision elements are necessary, but not sufficient, to ensure that private parties do not use *Parker* immunity to shield themselves while they restrict trade for private purposes. The Court should also apply a *substantive* standard to ensure that restraints of trade under *Parker* immunity are not imposed for purely private interests. Edlin & Haw, *supra*, at 1145-50, propose that the Court apply a Rule of Reason requirement in such cases. Earlier writers suggested that the Court require some evidence of market failure that the restraint would redress. John Shepard Wiley Jr., *A Capture Theory of Antitrust Federalism*, 99 Harv. L. Rev. 713, 756 (1986). *See also* Hettich, *supra*, at 147-50 (proposing a "reasonableness" inquiry).

If, as this Court has declared, "[t]he preservation of the free market and of a system of free enterprise without price fixing or cartels is essential to economic freedom," *Ticor*, 504 U.S. at 632, there can be no justification for granting such immunity whenever the state takes merely *procedural* steps—which it might do by a *pro forma* declaration. While the active supervision requirement helps prevent the immunity

inquiry from becoming "purely formalistic," *Hallie*, 471 U.S. at 39, that element still allows states to authorize private parties to block their own competitors from the market—contrary to national policy and to the detriment of consumers—whenever officials retain some general supervisory authority. *See, e.g., Bates v. State Bar of Arizona*, 433 U.S. 350, 362 (1977).

This is problematic not merely as a matter of economic policy but because state licensing entities frequently violate the *constitutional* rights of entrepreneurs by barring them from the market solely to protect existing firms from competition. *See, e.g., Bruner*, 2014 WL 375601, at *7; *see also Merrifield*, 547 F.3d 978; *Craigmiles*, 312 F.3d 220; *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013). As Justice Stevens warned, "[t]he risk that private regulation of market entry, prices, or output may be designed to confer monopoly profits on members of an industry at the expense of the consuming public" is particularly acute when "whenever government delegates licensing power to private parties whose economic interests may be served by limiting the number of competitors." *Hoover*, 466 U.S. at 584 (Stevens, J., dissenting). That is not merely a financial concern; it also endangers "'the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose [subject to] conditions imposed for the protection of society,'" *Lowe v. SEC*, 472 U.S. 181, 228 (1985) (White, J., concurring) (citation omitted)—a right Justice Douglas called "the most precious liberty that man possesses." *Barsky v. Bd. of Regents of the Univ. of State of N.Y.*, 347 U.S. 442, 472 (1954) (Douglas, J., dissenting).

Courts should be especially wary when states put federal constitutional rights at the mercy of private parties who have a private interest in blocking the exercise of those rights.[7] This Court should therefore ensure that the "national policy in favor of competition," *Midcal*, 445 U.S. at 106, serves as a meaningful baseline from which states may deviate only when substantially justified. *Parker* immunity should apply only where the restraint on trade substantially furthers an important government interest.

If state immunity from the antitrust laws is granted "out of respect for the State, not out of respect for the economics of price restraint," *Ticor*, 504 U.S. at 633, then the flexibility accorded to states under the antitrust laws should mirror the flexibility accorded to states when they deviate from other federal legal or constitutional baselines. A rule that in some sense parallels the notion of "cooperative federalism" would best reconcile state and federal interests in this area. That phrase typically refers to federal laws that "offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation." *New York v. United States*, 505 U.S. 144, 167 (1992). In the antitrust realm, the Court should apply the converse rule:

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[7] This Court has long recognized that where a private actor serves as an instrument of the state, it may be required to comply with constitutional standards. *Evans v. Newton*, 382 U.S. 296, 299 (1966). Thus private parties acting as instruments of the government must obtain a warrant when conducting a search. *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 614 (1989), and a government-created private corporation must comply with the First Amendment in its dealings with citizens. *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 399 (1995).

federal antitrust liability will presumptively apply, unless the state's restriction on competition is necessary to accomplish an important end. Such a rule would "encourag[e] a State to conform to federal policy choices," while allowing "the residents of the State [to] retain the ultimate decision as to whether or not the State will comply," and "[i]f a State's citizens view federal policy as sufficiently contrary to local interests," the state could deviate. *Id.* at 168.

Usually, cooperative federalism schemes are expressly provided for in federal statutes and are administered by federal agencies that retain power to accept or reject a state's proposed program. *See generally* Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. Rev. 663, 669-73 (2001). For example, the Clean Air Act sets a federal clean air standard, but allows the states flexibility in accomplishing that goal. *See Bethlehem Steel Corp. v. Gorsuch*, 742 F.2d 1028, 1036 (7th Cir. 1984). The antitrust statutes do not include any such provision—but they do not include any explicit immunity for state action, either. That immunity is the creature of common law, and this Court retains authority to determine its contours. Because unlike the ordinary cooperative federalism model, *Parker* immunity allows states to act *contrary to* the federal antitrust baseline, some sort of oversight by the courts is warranted to ensure that states do not inflict the sort of anticompetitive harms that the antitrust laws were meant to proscribe.

The proper test should be that the restraint on trade that the state commands and actively supervises must substantially advance an important interest.

A rational basis test would be excessively deferential, and would permit a state to grant immunity essentially whenever it chooses to, contrary to national policy. This Court is rightly reluctant to lower the standard of scrutiny to the minimal rational basis level, particularly where the applicable law is more than a mere prohibition on irrationality. *See D.C. v. Heller*, 554 U.S. 570, 629 n.27 (2008). Here, there *is* more: the "national policy, reflected in the antitrust laws, of insisting upon the primacy of competition as the touchstone of economic regulation." *Penn-Cent. Merger & N & W Inclusion Cases*, 389 U.S. 486, 500 (1968).

This Court should therefore apply an intermediate form of means-ends scrutiny which would require a state to articulate an important goal to be accomplished by exempting private parties from federal antitrust laws, and require that the exemption serve that end in reality. *Cf. Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 542 (2005) ("substantial advancement" test "asks, in essence, whether a regulation of private property is effective in achieving some legitimate public purpose."); *Craig v. Boren*, 429 U.S. 190, 198 (1976) (substantial advancement test not satisfied by "administrative ease and convenience" or other weak justifications).

An analogy to this Court's jurisprudence under the Federal Arbitration Act is instructive. That Act—which, like the antitrust laws, was passed under Congress's power to regulate commerce among the several states—provides that an arbitration agreement is valid as a matter of federal law, except where the agreement is invalid, for reasons of state law. *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987). Some states—

notably, California—have adopted various strategies trying to exploit this exception and invalidate arbitration agreements, contrary to federal policy. *See generally* Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts Are Circumventing the Federal Arbitration Act*, 3 Hastings Bus. L.J. 39 (2006). This Court has repeatedly reversed attempts to devise state common law rules that contradict the federal law. *See, e.g., AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Preston v. Ferrer*, 552 U.S. 346 (2008). In doing so, it has not been satisfied by a state's mere assertions that it is applying ordinary contract law, but has scrutinized the *substance* of state court decisions to enforce the federal rule that arbitration agreements may be held invalid as a matter of state law only where that state law "arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." *Perry*, 482 U.S. at 492 n.9. This prohibits state courts from applying different interpretive devices to arbitration contracts than to other contracts, regardless of the *procedural* formalities they employ; otherwise state courts could "effect what the state legislature cannot," namely, a violation of federal law. *Id.* A similar rule should apply here: while states may, for certain limited reasons, act in ways that would otherwise violate federal law, courts must apply a *substantive* test to determining when such acts are valid, so as to ensure that states do not use procedural devices to evade the federal antitrust law. In short, the state law restraining trade should substantially advance an important government interest.

One possible objection to this approach is that it would involve the Court in reviewing state economic policies, and thus would "reduce[] the range of

regulatory alternatives available to the State." *Southern Motor Carriers*, 471 U.S. at 61. But this objection fails for three reasons.

First, antitrust law has already deeply enmeshed the courts in national economic policy. Major elements of antitrust law are the products of court rulings, not of legislative or even administrative decision-making. A substantive limit on *Parker* immunity would therefore not implicate concerns about "[striking] down economic regulation enacted by the peoples' representatives," *NFIB v. Sebelius*, 132 S. Ct. 2566, 2628-29 (2012) (Ginsburg, J., dissenting) (citing *Lochner v. New York*, 198 U.S. 45, 64 (1905)). Indeed, courts already apply—and must apply—*some* form of means-ends scrutiny in cases involving purported state antitrust immunity. The only alternative would be to declare that *all* state regulations preempt the antitrust laws, which is not an acceptable conclusion. Hettich, *supra*, at 142.

Second, as this Court has repeatedly asserted, the federal antitrust laws *already* proclaim national economic policy—that policy being one opposed to cartel behavior by private parties excluding their rivals from the marketplace. *Penn-Cent. Merger & N & W Inclusion Cases*, 389 U.S. at 500; *Lafayette*, 435 U.S. at 408 (plurality opinion); *Midcal*, 445 U.S. at 106. Applying a substantial advancement test would simply *enforce* policies articulated in existing statutes—and would not create a subjective, judicially-created policy.

Finally, the extreme forms of judicial deference are usually applied only where the political process is believed to be a sufficient safeguard for the individual rights at issue. But the political process is certainly not enough to prevent private parties vested with state

authority from engaging in anticompetitive and self-interested behavior. Hettich, *supra*, at 143. The general public is typically unaware of anticompetitive conduct—especially where state law establishes only a vague "permissive policy," *Southern Motor Carriers*, 471 U.S. at 61—and although the public genuinely suffers from such conduct, the rewards for those who benefit from it are great enough to ensure that beneficiaries can prevent any serious reform efforts by offended taxpayers. Edlin & Haw, *supra*, at 1140 ("Individual consumers lack the incentive to participate in the process of licensing regulation; rarely would it be rational for a consumer to take the time and effort to try to change a licensing rule in the hopes of getting a cheaper haircut.").

In fact, in many cases, including this one, neither the general public nor the legislature has any direct control over those engaged in the anticompetitive conduct. Instead, the Board is directly elected to fixed terms by those who benefit from such conduct—not by the general public or by their elected officials, and certainly not by the entrepreneurs who need protection from the Board, and whose right to earn a living is sacrificed by barriers to entry. Such entrepreneurs are "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973). Also, restraints of trade under the color of state law often have spillover effects in other states, where those who suffer from the conduct again have no power to take political action against it. Hettich, *supra*, at 143.

Simply put, a substantive, and not merely procedural, test is needed to protect the constitutional

rights of entrepreneurs, who have no realistic political protection against vested interests who exploit *Parker* immunity and state power to block newcomers from exercising their right to earn a living in the occupation of their choice. A substantial advancement test would leave states with flexibility to authorize private parties to restrain trade where doing so is important, and would ensure that entrepreneurs are not wholly at the mercy of the very firms who have the strongest interest in barring them from the marketplace.

CONCLUSION

The decision below should be *affirmed*. This Court should accord *Parker* immunity to private parties acting under color of state law only where (a) the restraint of trade in question is commanded by state law, (b) the private actors act under the state's active supervision, and (c) the restraint substantially advances an important state interest.

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AMICUS CURIAE BRIEF

No. 13-534

IN THE

Supreme Court of the United States

NORTH CAROLINA BOARD OF DENTAL EXAMINERS,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN, INC., IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE[1]

Public Citizen, Inc., a national consumer-advocacy organization founded in 1971, appears on behalf of its members before Congress, administrative agencies, and courts on a wide range of issues and works for enactment and enforcement of laws protecting consumers, workers, and the general public. Public Citizen often represents consumer interests in litigation, and regularly files amicus curiae briefs in cases in this Court and the federal appellate courts.

Public Citizen submits this brief because of its belief that the Fourth Circuit's decision in this case correctly found that the federal antitrust laws' state action exemption does not apply to the conduct the FTC challenges in this case. A contrary holding would significantly expand the scope of the exemption to encompass essentially private collusion among competitors in the guise of enforcement action by a licensing board—privately interested behavior neither authorized by the state nor carried out under its supervision. By applying and reinforcing the state action doctrine's requirement of active state supervision of anticompetitive activity, this Court can uphold the purposes of federal antitrust law and protect consumers against the extraction of monopoly rents that results when boards composed of industry members artificially inflate prices by excluding competitors from lucrative parts of their businesses.

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[1] This brief was not authored in whole or part by counsel for a party. No one other than amicus curiae or its counsel made a monetary contribution to preparation or submission of this brief. Letters of consent to filing from counsel for all parties are on file with the Clerk.

SUMMARY OF ARGUMENT

State action immunity is a limited and functional doctrine under which states acting in their regulatory capacities are immune from antitrust enforcement. In extending the benefits of this doctrine to private actors that claim to be acting under the authority of a state regulatory program, this Court has established a two-part test to ensure that such entities are genuinely acting with specific state authorization: First, their actions must reflect a "clearly articulated and affirmatively expressed" state policy to restrict competition; second, their anticompetitive actions must be "actively supervised by the State itself." *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97, 105 (1980).

In *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 38, 46–47 (1985), this Court held that, because of their nature as local, democratically governed political entities, municipalities are unlikely to be acting to further private anticompetitive interests and therefore need not be actively supervised by the state in order to share its antitrust immunity when the state has clearly articulated an anticompetitive policy. The petitioner here, the North Carolina Board of Dental Examiners, is an industry-dominated board accorded authority by the State of North Carolina to license dental practitioners. The Board insists that it, like the municipality in *Hallie*, also may claim exemption from the active supervision requirement because it is denominated a state agency. *Hallie*, however, does not turn on a formal distinction between public and private actors, but on a realistic assessment of whether the nature of a particular type of organization is such

that it is likely to act to further private rather than public interests.

Thus, the relevant inquiry is not whether the Board is defined as a state agency under North Carolina law, but whether "there is a real danger that [the Board] is acting to further [its] own interests, rather than the governmental interests of the State." *Hallie*, 471 U.S. at 47. *Hallie*'s holding that a municipality poses no such danger says little or nothing about whether a board dominated by particular private interests does so. Such a board, charged with regulating the industry its members are a part of, is highly likely to reflect the particular economic interests of its constituents rather than to act as a government body regulating in the public interest. Thus, the reasoning of *Hallie* demands that the Board be subject to the active supervision requirement to receive antitrust immunity.

The danger that regulatory boards representing the private interests of regulated industries will pursue those private interests in an anticompetitive manner is real. Such boards have proliferated widely. More professions are licensed than ever before—over 800 as of 2006—and nearly one third of the national workforce is in licensed occupations. In many cases, it makes sense for practitioners to be involved in professional licensing because they know what the profession should require for minimum competency. Nonetheless, practitioners on such boards, as rational economic actors, are not immune to the temptation to use their authority to advance their self-interest. There are many examples of such boards acting to protect their industries from competition while the state itself is not paying attention.

State action immunity should remain limited and functional in its application. Boards like the one here should receive no special dispensation from the requirements of the state action immunity doctrine because their economic incentives do not align with the public interest. The determining factor should be neither the formal label attached to the board nor the specific mechanism by which its members are appointed, but whether the nature of the board presents the danger of privately interested action found to be absent in *Hallie*. Boards made up of or dominated by industry members should therefore not receive immunity unless there is both (1) a state policy to displace competition that is clearly articulated by the state's lawmakers and (2) active supervision by state entities that reflect public rather than private interests. Such boards will not always act against the public interest, but antitrust enforcers (both public and private) should be able to raise the question whether, in an individual case, a board acted in a manner the antitrust laws forbid.

ARGUMENT

I. The Board Should Not Be Exempted from the Active Supervision Requirement Merely Because State Law Treats It as a State Agency.

A. The Active Supervision Requirement Is Critical to Containing State Action Immunity Within Its Proper Bounds.

In *Parker v. Brown*, 317 U.S. 341 (1943), this Court recognized a state action exemption to the federal antitrust laws, holding that because nothing in the "words and history" of the Sherman Act demonstrates that it should apply to the states as sovereign

political actors, a state acting in its regulatory capacity is immune from antitrust liability. *Id.* at 351–52. In cases throughout the following seventy years, this Court has repeatedly stated that because the immunity contravenes the "fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws," the state action carve-out is limited and, indeed, "disfavored." *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1010 (2013); *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992). Only those actions attributable to the "state itself" in furtherance of its own policy are exempt. *Phoebe Putney*, 133 S. Ct. at 1012.

The Court has held that state action immunity may sometimes be extended to private entities acting under an affirmative state regulatory policy to displace competition, but has set out strict rules to limit the circumstances in which immunity is available. In *California Retail Liquor Dealers Ass'n v. Midcal Aluminum*, this Court held not only that such a state policy must be "clearly articulated and affirmatively expressed," but that the conduct for which immunity is sought must be "'actively supervised' by the State itself." 445 U.S. at 105 (quoting *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 410 (1978) (plurality opinion)).

The requirement of active supervision is as essential as the clear articulation requirement to ensuring that anticompetitive conduct is attributable to the "state itself." The active supervision requirement operates to "prevent[] the State from frustrating the national policy in favor of competition by casting a 'gauzy cloak of state involvement' over what is essentially private anticompetitive conduct." *So. Motor*

Carriers Rate Conf., Inc. v. United States, 471 U.S. 48, 57 (1985). The requirement ensures that the state not only "intend[s]" a displacement of competition, but also implements it "in its specific details." *Ticor*, 504 U.S. at 603.

The active supervision requirement "stems from the recognition that '[w]here a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interest, rather than the governmental interests of the State.'" *Patrick v. Burget*, 486 U.S. 94, 100 (1988) (quoting *Hallie*, 471 U.S. at 47). Requiring state supervision of anticompetitive conduct addresses this concern by "ensur[ing] that the state-action doctrine will shelter only the *particular* anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies." *Id.* at 100–01 (emphasis added). To meet this objective, it is not enough that there be "some state involvement"; rather, "state officials [must] have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." *Id.* at 101. Unless the state exercises "ultimate control" in this manner, "there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests." *Id.*

The active supervision requirement thus works hand in hand with the clear articulation requirement to "ensur[e] that particular anticompetitive mechanisms operate because of a deliberate and intended state policy." *Ticor*, 504 U.S. at 636. Absent the active supervision requirement, state action immunity might require "little more than that the State has not acted

through inadvertence," as the clear articulation standard by itself "cannot ensure, as required by [the Court's] precedents, that particular anticompetitive conduct has been approved by the State." *Id.* at 636–37. Put another way, "the requirement of active state supervision serves essentially an evidentiary function: it is one way of ensuring that the actor is engaging in the challenged conduct pursuant to state policy." *Hallie*, 471 U.S. at 46.

More fundamentally, the active supervision requirement also ensures that states bear "political responsibility" and accountability if they intend to displace competition: They must both "sanction[] and undertake[] to control" anticompetitive conduct if they seek to immunize it from antitrust scrutiny. *Ticor*, 504 U.S. at 636. They may not do so simply by articulating general policies while avoiding the responsibility of controlling whether the particular applications of those policies are carried out in ways that benefit private interests in avoiding competition. *See id.* at 636–37. The active supervision requirement thus helps ensure that "the requirement of clear articulation" does not "become a rather meaningless formal constraint." *Id.* at 637.

B. *Hallie*'s Exception to the Active Supervision Requirement Applies Only to Entities That Pose No Real Danger of Serving Private Anticompetitive Interests.

The question in this case is whether the active supervision requirement applies to claims of immunity made by an entity that is in some sense public but is not "the State itself." *Phoebe Putney*, 133 S. Ct. at 1010. In *Hallie*, this Court addressed a claim to immunity for one such non-state (or "substate," *id.*)

public entity—a municipality. The Court held that a municipality's claim to state action antitrust immunity does not depend on a showing of active supervision because the nature of a municipal government is such that there is no "real danger" that its actions will reflect private interests in suppressing competition. *See* 471 U.S. at 47. Contrary to the Board's suggestion here, that holding does not extend to any entity that can claim the label of an "arm of the State," *id.* at 45, but is properly limited to those whose nature is such that they likewise pose no "real danger that [they are] acting to further [their] own interests, rather than the governmental interests of the State." *Id.* at 47.

As this Court has stated, "[t]he starting point in any analysis involving the state action doctrine is the reasoning of *Parker v. Brown*." *Hallie*, 471 U.S. at 38. That reasoning, as applied in *Hallie*, requires that the terms under which *Parker* immunity is extended beyond the state itself reflect a realistic assessment of the incentives that drive the entity in question, not purely formalistic considerations.

State action immunity is a functional and pragmatic doctrine. The Court applies the doctrine "practically, but without diluting the ultimate requirement that the State must have affirmatively contemplated the displacement of competition such that the challenged anticompetitive effects can be attributed to the 'state itself.'" *Phoebe Putney*, 133 S. Ct. at 1012. Thus, the Court has commanded that the courts, when considering "clear articulation," realistically examine whether anticompetitive impacts are the "inherent, logical, or ordinary result" of a state's policy. *Id.* The same practicality is evident in reasoning about the active supervision requirement, which requires a real-

istic assessment of whether the state has actually "exercised sufficient independent judgment and control so that the details of the [anticompetitive policy] have been established as a product of deliberate state intervention"—a determination that requires consideration not merely of whether the state has the power to supervise in the abstract, but whether "the potential for state supervision" is "realized in fact." *Ticor*, 504 U.S. at 634, 638.

In *Hallie*, the Court applied its functional methodology to a claim of immunity by a municipality—an entity that is public, but is not the state itself. 471 U.S. at 38. Based on practical rather than formalistic considerations—including the facts that "municipal conduct is invariably more likely to be exposed to public scrutiny than is private conduct," and that "municipal officers ... are checked to some degree through the electoral process," *id.* at 45 n. 9—the Court held that active state supervision is not necessary to a municipality's claim of state action immunity. The nature of a municipal government, the Court reasoned, is such that its actions are unlikely to be based on the pursuit of private gain:

> Where a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State. Where the actor is a municipality, there is little or no danger that it is involved in a *private* price-fixing arrangement. The only real danger is that it will seek to further purely parochial public interests at the expense of more overriding state goals. This danger is minimal, however, because of the requirement that the municipality act pur-

> suant to a clearly articulated state policy. Once it is clear that state authorization exists, there is no need to require the State to supervise actively the municipality's execution of what is a properly delegated function.

Hallie, 471 U.S. at 47.

Thus, the inquiry in *Hallie* was not focused only on whether a municipality was an arm of the state, but on whether this particular arm of the state was likely to seek to suppress competition for its own benefit. Indeed, the same consideration has led this Court to leave open the possibility of an exception to *Parker* immunity even for the state itself, when it acts not as a political body, but as a market participant. *Phoebe Putney*, 133 S. Ct. at 1010 n.4 (citing *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 379 (1991)).

That *Hallie*'s result did not turn on the formality that a municipality is an "arm of the State," 471 U.S. at 45, is confirmed by the Court's simultaneous characterizations of its earlier decision in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975). There, the Virginia State Bar had threatened to enforce a minimum fee schedule through disciplinary action against attorneys who deviated from it. The State Bar, like the Board here, was defined by Virginia law as an agency of the state, although it was composed of the attorneys whose activities it regulated. *Id.* at 776 & n.2, 790 & n. 20; 791. This Court held that such an agency was not immune from antitrust scrutiny for its attempt to fix prices because its actions were not "required by the State acting as sovereign." *Id.* at 790. In *Southern Motor Carriers*, a decision handed down on the same day as *Hallie*, the Court clarified that *Gold-*

farb should be understood as holding, consistent with the later decision in *Midcal*, that "private parties were entitled to *Parker* immunity only if the State 'acting as sovereign' intended to displace competition" through means satisfying *Midcal*'s criteria. *So. Motor Carriers*, 471 U.S. at 60; *see also id.* at 61 ("[T]he Court [in *Goldfarb*] would have reached the same result had it applied the two-pronged test later set forth in *Midcal*.").

Strikingly, *Southern Motor Carriers* explicitly recognized that the State Bar in *Goldfarb* was called a "state agency," *id.* at 60, even while stating that its claim to immunity was subject to the requirements imposed on "private parties" claiming immunity under *Midcal*. *Id.* As the Court explained, "*Goldfarb* ... made it clear that, for purposes of the *Parker* doctrine, not every act of a state agency is that of the State as sovereign." *Id.* at 61 (quoting *Lafayette*, 435 U.S. at 410 (plurality opinion)).

Hallie likewise contrasted the municipality at issue there with the agency whose actions were scrutinized in *Goldfarb*. *Goldfarb*, the Court stated, "concerned private parties—not municipalities—claiming the state action exemption," and while "[w]e may presume ... that a municipality acts in the public interest," "[a] private party ... may be presumed to be acting primarily on his or its own behalf." 471 U.S. at 45. *Hallie*, together with *Southern Motor Carriers*, thus reflects the Court's explicit recognition that whether an entity is entitled to immunity without state supervision turns not on its formal designation as a state subdivision, but on whether its actual characteristics make it a privately interested actor.

The Board is thus fundamentally wrong in asserting that as a "*bona fide* state agency," it should be exempt from the second half of the *Midcal* test. Pet. Br. 18. The issue does not turn on such formalistic considerations as the authority to use a state seal, but on where the economic incentives lie. Whether to free the Board from the active state supervision requirement depends on whether its composition poses a "real danger" that it may act to pursue private interests "rather than the governmental interests of the State." *Hallie*, 471 U.S. at 47.

C. There Is a Real Danger That the Board's Actions Will Further the Private Interests of Its Members and Constituents Rather than the Interests of the State.

The reasoning of *Hallie* and of the Court's state action immunity jurisprudence as a whole offers no support for excusing the Board from satisfying the active state supervision requirement when it claims state action immunity against antitrust claims. The dispositive fact is that the Board is controlled by the interests of a private industry that not only makes up the great majority of the Board's membership, but elects all but one of the Board's members. The question whether the composition of a board that by law *must* consist of elected industry representatives who actively practice in the market they regulate poses a "real danger" of actions furthering the private interests of the industry constituents it represents rather than the "governmental interests of the State," *Hallie*, 471 U.S. at 47, answers itself. Such an industry-dominated body lacks the characteristics that led this Court to hold that municipalities need not be actively supervised by the state when they act pursuant to a

clear state policy of displacing competition because there is no real danger that they will pursue private interests.

An industry-dominated, self-regulatory entity, even when denominated a state agency, is more like a trade association than a public body. This Court's state action jurisprudence reflects its recognition that when such privately interested entities seek to regulate their industries by suppressing competition, "there is no realistic assurance that [the] private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests." *Patrick*, 486 U.S. at 101. Indeed, a privately interested entity "may be presumed to be acting primarily on ... its own behalf." *Hallie*, 471 U.S. at 45. As *Goldfarb* indicates, that presumption does not disappear merely because a privately interested organization is, as a legal matter, given the status of a state agency: Designating a private interest group a state agency does not transform it into the "State acting as a sovereign" for antitrust immunity purposes." 421 U.S. at 790.

This Court has repeatedly insisted that states may not simply "authorize" private actors to engage in anticompetitive activities. *Midcal*, 445 U.S. at 105–06; *Parker*, 317 U.S. at 351; *see, e.g.*, *Ticor*, 504 U.S. at 632–40. Active supervision is critical to ensuring that such activity in fact comports with state interests not only in general but in its particulars. *See id.* at 637. That objective is not served simply by designating a private industry body an arm of the state and letting it supervise itself. Such a formality does nothing to eliminate the "real danger" that a privately interested body will serve its private interests rather than those of the state itself, and hence, under the reasoning of

Hallie, it cannot justify eliminating the active state supervision requirement.

The issue, it should be emphasized, does not turn solely "on the method by which state officials are selected." Pet. Br. 59. An industry-dominated board is likely to pose a real danger of serving private interests regardless of whether its members are, as here, elected, or whether they are appointed in some other manner. As a practical matter, a licensing board's actions are no more likely to be "subjected to public scrutiny" or "checked to some degree through the electoral process" when its members are appointed than when they are elected by other market participants. *Hallie*, 471 U.S. at 45 n.9. And whether board members are elected or appointed, where a statute mandates that industry have majority voting power on the board, the temptation to serve the industry's economic interests will be present. Conceivably, the rigorous exercise of appointment and removal power by state officers to exercise actual control over actions of an industry-dominated board might in some instances suffice to demonstrate active state supervision, but the mere potential for the exercise of such authority constitutes neither active supervision, *see Ticor*, 504 U.S. at 638, nor a reason for dispensing with the requirement of active supervision.

II. Actions of Industry-Dominated Boards Show the Need for Active Supervision.

The industry-dominated licensing board at issue in this case is one example of a great number of professional licensing entities throughout the country, covering both traditional learned professions, such as lawyers and doctors, and ordinary businesses for which licensing has not historically been considered

necessary, such as auctioneers, florists, and casket sellers. These boards, usually created to regulate entry into a profession, are often dominated by members of the profession regulated.

Predictably, such boards frequently act in ways that benefit their industry constituencies. These actions exemplify the "real danger" of privately interested conduct that, under the reasoning of *Hallie*, differentiates these entities from municipalities and other governmental bodies that need not be subjected to active state supervision to receive antitrust immunity.

The activities of such boards also illustrate that the clear articulation requirement by itself is inadequate to ensure that anticompetitive actions genuinely reflect the interests and policies of the "state itself." The creation of a licensing board often reflects articulation of a policy to displace competition at least to some extent, as limiting entry into a business activity based on criteria developed by industry members is by nature anticompetitive. Where, as is often the case, the question is *how far* a state's policy of displacing competition extends, the active supervision requirement plays a critical role in ensuring that the *particulars* of anticompetitive self-regulatory actions in fact reflect the policy of the state as sovereign. *Ticor*, 504 U.S. at 636–37. Thus, the "evidentiary function" of the active supervision requirement remains an essential backstop to ensure that anticompetitive action is truly attributable to the state itself. *Hallie*, 471 U.S. at 46.

A. Occupational Licensing Has Proliferated, and Industry-Dominated Regulatory Boards Often Act Anticompetititvely.

Based on empirical research on the anticompetitive effects of licensing, economist Morris Kleiner found that over 800 different professions had licensure requirements as of 2006. Morris M. Kleiner, *Licensing Occupations: Ensuring Quality or Restricting Competition?* 5 (2006). In the 1950s, only five percent of the United States workforce was licensed; now, nearly one third is. *Id.*; Morris M. Kleiner & Alan B. Krueger, *Analyzing the Extent and Influence of Occupational Licensing on the Labor Market,* 31 J. Lab. Econ. S173, S198 (2013). Kleiner estimated that licensing costs consumers $116 to $139 billion every year and increases the wages of professionals who are licensed at the expense of workers who are not, contributing to wage inequality. Kleiner, *Licensing Occupations*, at 114–5. Both the costs to consumers and wage benefits to insiders that result from state licensing board activities are exactly the kinds of impacts that, if attributable to private collusion, are targeted by federal antitrust law.

Law professors Aaron Edlin and Rebecca Haw have investigated the regulatory powers of occupational licensing boards, concluding that the boards are "cartels by another name." Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. Pa. L. Rev. 1093 (2014). In Tennessee and Florida alone, Edlin and Haw found eighty-seven professional licensing boards, for professions as varied as accounting, auctioneering, cosmetology, funeral services, hearing-aid dispensing, and nutrition, among others. Ninety per-

cent of the boards in the two states are dominated by industry, and ninety-five percent have rulemaking authority by statute. *Id.* at 1157–64.

Edlin and Haw also found several curious examples of "new professions" requiring licensing in addition to the traditionally licensed professions. *See id.* at 1096–97; 1102–06. In Alabama, for example, interior decorating without a license was a criminal offense until 2007. *See* Clark Neily, *Watch Out for That Pillow*, Wall St. J., Apr. 1, 2008, at A17. In Louisiana, all flower-arranging must be supervised by a licensed florist. La. Rev. Stat. Ann. § 3:3808(B)(1).

To date, there has been little systematic research into the extent and breadth of the regulatory powers of industry-dominated boards and the degree to which they are exercised in the interest of market participants rather than the public. Edlin and Haw's work appears to be the first systematic review of the makeup of these boards at the state level, and we have not located similar comprehensive published analyses of boards in states other than Florida and Tennessee. Given the dearth of research, however, the ease with which one can find examples of potentially anticompetitive activities by such boards is striking.

The facts underlying two cases that the Fourth Circuit sought to distinguish below are good examples of these activities.[2] In *Hass v. Oregon State Bar*, 883

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[2] Our point here is not that these two cases were wrongly decided on the particular facts or that the activities involved necessarily violated the antitrust laws. Rather, we discuss the cases as examples of professional licensing boards that are granted broad authority and have used that authority in ways that appear to

(*Footnote continued*)

F.2d 1453 (9th Cir. 1989), the Oregon legislature authorized the state bar to require attorneys to carry malpractice insurance, and further authorized the bar to do what was "necessary and convenient" to implement the provision, including owning, organizing, or sponsoring an insurance organization. *Id.* at 1458 (citing Or. Rev. Stat. § 9.080(2)(a)). The state bar in turn mandated both that attorneys carry insurance and that they buy it from the bar itself, rather than in an open insurance market in which the bar would be a participant. *Id.* at 1455. The Ninth Circuit read Oregon's statutes as evincing intent to displace competition. *Id.* But the extent of Oregon's desire to displace competition was unknown: Did the state actually mean to authorize the bar not only to *own* an insurance company, but also to prevent any market competition for itself? Without state supervision, whether or not the state intended the *particulars* of the activity alleged to be anticompetitive remained uncertain.

In *Earles v. State Board of Certified Public Accountants*, a Louisiana statute authorized a state board of accountants to set the ethical standards for the profession. 39 F.3d 1033, 1035 (5th Cir. 1998). Under this authority, the board promulgated a rule prohibiting accountants from participating in "incompatible occupations," which would theoretically impair the accountants' objectivity, and another rule prohibiting the receipt of commissions. *Id.* The board then interpreted these rules to bar the plaintiff, a securities broker, from also acting as a CPA. *Id.*

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reflect the economic self-interest that the active state supervision requirement exists to counterbalance.

The board in *Earles* acted based on broad statements of authority by the legislature, authorizing no specific policy barring other professionals from being CPAs. *Id.* at 1042–43. The board was also "composed entirely of CPAs who compete in the profession they regulate," *id.* at 1041, creating the potential for self-interested behavior. Here, again, the state policy to set and enforce ethical standards as a general matter was clear, but the boundaries of that clear articulation were not obvious. Regardless of the merits of the policy, absent state supervision it is uncertain whether barring other professionals from competing as CPAs reflected the policy of the state as sovereign or the interests of a particular industry.

Earles and *Hass* barely scratch the surface of the potentially anticompetitive activities pursued by industry-dominated boards. The FTC has brought several cases against optometry boards for restricting competition. *See* FTC Office of Policy Planning, *Report of the State Action Task Force* 60–61 (2003) ("*State Action Report*"). For example, the FTC brought a complaint against a Massachusetts optometry board comprising four practitioners and one public member for restraining competition by limiting truthful advertising of discount rates. *In re Mass. Bd. of Registration in Optometry*, 110 F.T.C. 549 (1988). In the 1970s several state optometry boards created rules "discourag[ing] the 'commercial practice' of optometry" by banning "partnerships between optometrists and laymen, use of trade names, and chain operations combining the practice of optometry with the sale of eyeglasses in shopping centers," "in favor of

'traditional optometric practice.'" *Cal. Bd. of Optometry v. FTC*, 910 F.2d 976, 978 (D.C. Cir. 1990).[3]

Several states have attempted to restrict the market for caskets by permitting only licensed funeral directors to sell them. *See, e.g., St. Joseph Abbey v. Castille,* 712 F.3d 215 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 423 (2013) (Louisiana); *Powers v. Harris*, 379 F.3d 1208 (10th Cir. 2004) (Oklahoma); *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002) (Tennessee). Although the basic requirement was established in each state by statute, industry-dominated boards had developed implementing regulations and licensing requirements that further restricted casket sales, *see, e.g., Powers*, 379 F.3d at 1212, and had purported to exercise authority to enforce the restrictions through extrajudicial cease-and-desist orders, *see St. Joseph Abbey*, 712 F.3d at 219—much like the orders issued by the North Carolina Board in this case. The activities of the boards in restricting casket sales, moreover, were clearly unrelated to health or safety, as the laws did not impose requirements for the adequacy of caskets or even require them to be used burials. *See* Edlin & Haw, 162 U. Pa. L. Rev. at 1097, 1106; *St. Joseph Abbey*, 712 F.3d at 226; *Giles*, 312 F.3d at 225 (Tennessee law unrelated to health and safety).

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[3] The D.C. Circuit in *California Board of Optometry v. FTC* held that the FTC had exceeded its authority in purporting to adopt a rule that would have outlawed such restrictions even if imposed by state statute, a decision that was surely correct under *Hoover v. Ronwin*, 466 U.S. 558, 567–68 (1984), which held that state legislative action is exempt from the antitrust laws. The imposition of similar restrictions by industry-dominated boards, absent active supervision from the state itself, should not likewise be exempt from antitrust scrutiny.

St. Joseph Abbey, *Powers*, and *Craigmiles* all involved substantive due process challenges to the underlying statutes, the enactment of which could not in itself constitute an antitrust violation under *Hoover v. Ronwin*, 466 U.S. at 567–68.[4] The regulatory and enforcement activities of the industry-dominated boards, however, illustrate how, absent supervision by state officials, such boards can further suppress competition in ways not clearly contemplated by the state as sovereign.

In many states, veterinary boards have outlawed performance of dental procedures on animals by non-veterinarians. *See* Am. Veterinary Med. Ass'n, *State Summary Report: Authority of Veterinary Technicians and Other Non-Veterinarians to Perform Dental Procedures* (June 2014), https://www.avma.org/advocacy/stateandlocal/pages/sr-dental-procedures.aspx. Thus, "teeth-floaters," who file horses' teeth for a living—an activity necessary because horses' teeth never stop growing and their modern diet does not wear their teeth down fast enough—are now shut out of the market in favor of veterinarians. Inst. Just., *Challenging Barriers to Economic Opportunity: Challenging Minnesota's Occupational Licensing of Horse Teeth Floaters*, http://www.ij.org/minnesota-horse-teeth-floating-background.

State cosmetology boards have begun demanding that African-style hair braiding and eyebrow threading, two lucrative and popular practices that are not

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[4] The constitutional challenges yielded inconsistent results: The Sixth and Fifth Circuits struck down the restrictions, while the Tenth held that favoring the private interests of a particular industry constituted a rational basis for the law in question.

dangerous (they require, for example, no sharp instruments or chemicals), be performed only by licensed cosmetologists. Such licenses not only are costly, but may require graduation from a cosmetology school. Edlin & Haw, *supra* at 1106.

In California, the industry-dominated Travel and Tourism Commission, comprising representatives from five industry categories including the rental car industry, not only imposed fees on car rentals, but allegedly took actions that had the effect of compelling rental car companies to pass those fees on to consumers, thus suppressing potential price competition. *See Shames v. Cal. Travel & Tourism Comm'n*, 626 F.3d 1079 (9th Cir. 2010). The Ninth Circuit initially held that the Commission's action reflected a clearly articulated state policy and was also exempted from the state supervision requirement because the Commission, although dominated by the industries whose interests its actions served, was a governmental entity; on a petition for rehearing, the court held that state action immunity was unavailable because the action was not authorized with sufficient clarity and therefore did not reach the state supervision issue. *See id.* at 1085 & n.3.

Traditionally regulated professions are subject to anticompetitive regulations as well. Lawyers are particularly good at self-protection. For example, every state bar has restrictions on lawyer advertising, some of which are anticompetitive. *See* LexisNexis, *50 State Surveys of Statutes & Regulations: Attorney Advertising* (Mar. 2013) ("Every state regulates the advertising of its attorneys.") Some state bars preclude truthful claims about prices, just as the Massachusetts optometry board did. *See* Ohio R. Prof'l Conduct 7.1

cmt. 4 (stating that it is misleading to characterize rates as discounted). Several states restrict lawyers from including "non-verifiable" statements in advertising, a prohibition that may inhibit competitive behavior among lawyer advertisers. *See, e.g.*, Ala. Code Prof'l Conduct R. 7.2(e) (requiring affirmative statement that the lawyer is not representing that he is better than another); Alaska R. Prof'l Conduct 7.1(c) (no comparisons unless factually verifiable); Fla. R. Prof'l Conduct 4-7.2(b)(1)(D) (same); N.Y. R. Prof'l Conduct 7.1(d)(2) & (e)(2) (same); *see also Alexander v. Cahill*, 598 F.3d 79 (2d Cir. 2010) (striking down several New York attorney advertising restrictions on First Amendment grounds).

A number of state bars require lawyers to be physically present in real estate closings, limiting competition from national and internet-based lenders. *See State Action Report* at 68–69. Several state bars also have bona fide office requirements, limiting competition from attorneys who are licensed in multiple states. *See* N.Y. Jud. Law § 470; Del. Sup. Ct. R. 12(d); *Tolchin v. N.J. Sup. Ct.*, 111 F.3d 1099 (3d Cir. 1997) (rejecting constitutional challenges to New Jersey's bona fide office requirement, which has since been amended, *see* N.J. Sup. Ct. R. 1:21-1).

Insofar as state supreme courts promulgate bar rules, the rules themselves, like state legislative enactments, may be exempt from antitrust scrutiny under *Hoover v. Ronwin*, 466 U.S. at 569. The activity of state bars in promoting such rules, however, still demonstrates the propensity of industry-dominated licensing boards to act in their own self-interest and shows the need for state supervision when they take action themselves. And to the extent state bars act to

interpret and enforce bar rules, they remain subject to potential antitrust scrutiny, as *Goldfarb* illustrates.

In many states, nurse practitioners cannot provide care independently of doctors, despite adequate training to perform services not requiring a physician. Such restrictions tend to limit availability of medical care, drive patients to physician-run practices, and may have price impacts on consumers who could benefit from wider availability of clinical services. *See Scope-of-Practice Laws for Nurse Practitioners Limit Cost Savings That Can Be Achieved in Retail Clinics*, 32 Health Aff. 1977 (2013). Similarly, many state dental boards limit the number of dental hygienists dentists may hire. *See* J. Liang & Jonathan Ogur, FTC Bureau of Econ., *Restrictions on Dental Auxiliaries: An Economic Policy Analysis* 6 & n.6 (1987), http://www.ftc.gov/sites/default/files/documents/reports/restrictions-dental-auxiliaries/232032.pdf (noting that restrictions generally allow dentists to employ between one and three hygienists).

In sum, many more occupations are regulated than ever before, and most boards doing the regulating—in both traditional and new professions—are dominated by industry members who compete in the regulated market. Those board member-competitors, in turn, commonly engage in regulation that can be seen as anticompetitive self-protection. The particular forms anticompetitive regulations take are highly varied, the possibilities seemingly limited only by the imaginations of the board members.

B. Active State Supervision Is a Necessary Corrective for the Tendency of Industry-Dominated Boards to Regulate in the Service of Private Interests.

State licensing of occupations and other forms of economic regulation are often critical to the protection of consumers and the public at large. This Court has long recognized that states have obvious and legitimate interests for engaging in such regulation. As the Court put it in *Goldfarb*, "We recognize that the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions." 421 U.S. at 792.

Reliance on the expertise of those who practice a particular profession or trade, moreover, is an important and often necessary aspect of the creation of standards for the licensure and conduct of industry members. The purpose of creating state licensing boards comprising industry members and granting them rulemaking and enforcement authority is to enlist the assistance of presumed experts. Who better than the licensed professionals themselves—dentists, lawyers, doctors, or accountants—to know what standards are required for minimum competency in those professions?

Regulation also, at least in many instances, necessarily implies some displacement of competition. Licensing itself is anticompetitive in the sense that it restricts entry into an occupation, and many other forms of regulation may restrict practices that, in an

environment of unrestrained competition, would be prevalent, if not rampant.

These are not, however, reasons for excusing industry-dominated licensing or regulatory boards from the requirement of active state supervision. They are the very reasons that necessitate the requirement. When a state authorizes licensing or regulatory actions that displace competition to some extent, there will in most cases be uncertainty at the margins concerning the extent of that authorization, leaving room for argument both ways as to whether any resulting action reflects a clearly articulated state policy to displace competition. Whether a particular restriction on competition falls within the scope of a clearly articulated state policy may at times be in the eye of the beholder. *Compare Shames*, 626 F.3d at 1084–85 (holding on rehearing that there was no clearly articulated state policy because "there is no indication California authorized interference by the CTTC with normal industry competition"), *with Shames v. Cal. Travel & Tourism Comm'n*, 607 F.3d 611, 617 (9th Cir. 2010) (same panel holding on initial hearing that there was a clearly articulated policy because "the provisions here are comparable to those in which courts have found anticompetitive conduct legislatively authorized").

Industry members, moreover, are not only the foremost experts concerning their business, but also the very persons most likely to have private interests that will be affected, and potentially advanced, by actions that push the envelope of authorization (such as the Board's purported exercise in this case of authority to engage in extrajudicial enforcement measures against competitors in the teeth-whitening business).

Allowing entities controlled by private interests to police the limits of their own authority poses an inherent risk that they will act in the service of their private interests and not those of the state as sovereign and the public that it represents. Of course, this risk is the precise reason for the active supervision requirement, which ensures that the particulars of any potentially anticompetitive action are attributable to the state itself and not to private interests.

That the danger of self-interested activity counsels retention of the active state supervision requirement for entities of this sort does not mean that their actions are always suspect. Suppressing particular forms of competition (including some of the examples described above) may reflect sound public policy even if it incidentally benefits some private interests at the expense of others. Moreover, states that wish to make use of such boards are capable of exercising, and in a great many instances have exercised, active supervision over their activities, ensuring that if anticompetitive policies are chosen, they are chosen to advance state rather than private interests. *See* Resp. Br. 54–55. And even where such supervision is absent, particular actions of industry-controlled boards, although not immune from antitrust scrutiny, may also be found not to violate the antitrust laws under the rule of reason. But the potential for action motivated by self-interest rather than state interest weighs against granting an industry-dominated board that is not subject to active supervision the immunity possessed by the state when it acts as sovereign. The public role played by such an entity "does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members." *Goldfarb*, 421 U.S. at 791.

Here, that North Carolina has charged the Board with the licensing of dentistry to ensure safety and the public interest, N.C. Gen Stat § 90-22, does not give the Board carte blanche to benefit its members anticompetitively. The Board is empowered to regulate dentistry by setting minimum standards of "good moral character" and "academic education," and requiring graduation from an accredited dental school and a minimum score on a "clinical licensing examination." *Id.* § 90-30. Even on the dubious assumption that the Board's actions in this case reflect a clearly articulated statutory policy to limit teeth-whitening to licensed dentists, the Board's actions in responding to complaints by dentists about lower-priced competition by routinely sending cease-and-desist letters, *see* Pet. App. 75a, J.A. 30, constitute an attempt to suppress competition without supervision by disinterested state officials.[5] Whether or not it is ultimately defensible, the Board's unsupervised attempt to bypass ordinary state law enforcement processes to benefit its industry constituents by isolating them from competition does not clearly reflect a policy adopted by the state *in its specific details*, *Ticor*, 504 U.S. at 603, and therefore should not receive immunity on the premise that it reflects action of the state as sovereign.

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[5] The claim of clear authority here rests on a statutory provision defining dentistry to include the removal of "stains, accretions, or deposits from the human teeth," N.C. Gen. Stat. § 90-29(b)(2), which is a far cry from a requirement that only dentists may provide peroxide-based teeth-whitening services.

CONCLUSION

The Court should affirm the decision of the court of appeals.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 13-534

In The
Supreme Court of the United States

NORTH CAROLINA STATE
BOARD OF DENTAL EXAMINERS,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Fourth Circuit**

BRIEF OF *AMICI CURIAE* SCHOLARS OF PUBLIC CHOICE ECONOMICS IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICI CURIAE*[1]

The undersigned *amici* are 45 researchers and academics who are experts in the field of public choice and regulatory economics. *Amici* believe that research in the field of public choice economics will assist this Court in reaching a decision based on an accurate understanding of the narrow political and economic interests that dominate occupational-licensing boards like the North Carolina State Board of Dental Examiners and also limit the ability of these boards to accurately represent the public will or promote the public good.[2]

The *amici* joining this brief are:

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[1] Pursuant to Supreme Court Rule 37.2(a), *amici* state that all parties have consented to the filing of this brief by filing notices of blanket consent with the Court. Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no such counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

[2] The views set forth in this brief are those of the *amici* and do not necessarily reflect the views of the academic or research institutions with which they are affiliated.

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SUMMARY OF THE ARGUMENT

The central legal question in this case is whether the North Carolina State Board of Dental Examiners – which consists almost entirely of licensed dentists selected by other licensed dentists – should be entitled to the benefit of state-action immunity against federal antitrust laws. *Amici* contend that the answer to that question must turn not only on legal principles, but also on the best available social-science evidence regarding the way that occupational-licensing boards like North Carolina's operate in the real world. As this brief will explain, in the real world, occupational-licensing boards routinely use government power to promote the private financial interests of their own members and licensees, rather than to promote any legitimate government interests.

The evidence for this conclusion is supplied by a branch of economics known as "public choice economics." Public choice economics is the application of economic theory to study the causes and effects of government actions. Public choice economics has been widely and successfully used to explain and predict the forces that lead to the enactment of occupational-licensing laws and the behavior of occupational-licensing boards. A central finding of this research is that when self-interested economic actors – such as

licensed dentists – are given the power to influence or, as in this case, actually write the rules by which others will compete with them, they behave as self-interested private actors, rather than as stewards of the public interest.

These predictions are not merely theoretical. There is abundant evidence that this is precisely how dental boards across the country have operated in recent years, moving aggressively to cartelize teeth-whitening services. The evidence also demonstrates that these cartelization efforts have been driven overwhelmingly by licensed dentists seeking to restrict competition, rather than by consumer complaints or evidence of consumer harm caused by non-dentist teeth whiteners.

In light of these findings, *amici* conclude that "there is no realistic assurance" that the North Carolina State Board of Dental Examiners' "anticompetitive conduct promotes state policy, rather than merely the party's individual interests." *Patrick v. Burget*, 486 U.S. 94, 100 (1988). Under these facts, extending state-action immunity to the North Carolina State Board of Dental Examiners is likely to harm consumers and entrepreneurs while providing few, if any, public benefits.

ARGUMENT

When an economic interest group is given free rein to enact regulations that exclude potential

competitors from the marketplace, should we expect that group to use its power in the service of legitimate governmental interests, or should we instead expect that group to promote its own private interests and those of its friends?

One does not need a Ph.D. in economics – or even a particularly keen insight into human nature – to guess the answer to this question. Nevertheless, economists have conducted a great deal of study on this and other related questions. Perhaps not surprisingly, economists have generally observed that governmental regulation – particularly regulation that restricts economic competition – frequently reflects the dominant influence of politically powerful interest groups, not the interests of voters, consumers, or would-be competitors. The likelihood of this occurring is even greater when, as in this case, a politically powerful interest group is directly empowered to create and enforce government policy.

These conclusions are drawn from a body of research known as "public choice economics." In section I, *amici* describe the basics of public choice economics and explain why it predicts that self-interested actors, such as the members of the North Carolina State Board of Dental Examiners, are likely to use government power to serve their own private interests rather than the governmental interests of the State. In section II, *amici* demonstrate that the predictions of public choice economics are borne out by real evidence, and that the North Carolina State Board of Dental Examiners' cease-and-desist letters

to non-dentist teeth whiteners bear all of the hallmarks of self-dealing and regulatory capture.

I. Public Choice Economics Predicts That Occupational Licensing Boards Like the North Carolina State Board of Dental Examiners Routinely Serve the Private Interests of Members of the Regulated Occupation Rather Than the Public Interest.

In section A, *amici* provide a basic overview of what public choice economics is and the reasons why it is relevant to this case. In section B, *amici* demonstrate that public choice economics explains how concentrated interest groups like licensed dentists are able to enact regulations that benefit themselves financially while harming their competitors and consumers. Finally, in section C, *amici* explain why public choice problems are particularly acute in this case, in which dentists are doing more than seeking government favors – they are actually writing the rules that will govern if, how, and when anyone else will be allowed to compete with them in the lucrative market for teeth-whitening services.

A. Public choice economics studies the causes and effects of government regulations.

Public choice economics, or public choice theory, is "the economic study of nonmarket decision making, or simply the application of economics to political

science." Dennis C. Mueller, *Public Choice III* at 1 (2003). Public choice is a well-established field of study that has been "almost universally accepted" since the mid-1980s as explaining much economic regulation. Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 Colum. L. Rev. 223, 224 n.6 (1986) (citing Joseph P. Kalt & Mark A. Zupan, *Capture and Ideology in the Economic Theory of Politics*, 74 Am. Econ. Rev. 279 (1984)). At least five senior figures in the field of public choice have been awarded the Nobel Prize in Economic Science: Kenneth Arrow, James Buchanan, Elinor Ostrom, Vernon Smith, and George Stigler. *All Prizes in Economic Sciences*, Nobelprize.org – The Official Web Site of the Nobel Prize, http://www.nobelprize.org/nobel_prizes/economic-sciences/laureates/ (last visited Aug. 4, 2014).

Among other things, these and other public choice economists have studied the causes and effects of governmental regulation. Public choice theory rests on the fundamental assumption that politicians and constituents are rational economic actors; that is, constituents compete with one another to demand political favors from the government, and politicians frequently use the coercive powers of the state to provide wealth transfers in return for political support. "The interest group most able to translate its demand for a policy preference into political pressure is the one most likely to achieve its desired outcome." James C. Cooper, Paul A. Pautler, & Todd J. Zywicki, *Theory and Practice of Competition Advocacy at the*

FTC, 72 Antitrust L.J. 1091, 1100 (2005). The result is that governmental policies – particularly economic policies – often fail to reflect the interests of a majority of the public and instead generally reflect the comparative advantage of special interests to organize and exert political influence relative to the public. *See* Richard A. Posner, *Economic Analysis of Law* § 19.3, at 534–36 (6th ed. 2003).[3]

B. Public choice economics predicts that concentrated interest groups have both the incentive and the ability to restrict competition in ways that harm consumers.

The insights of public choice economics have profound consequences for this case. Among other things, the North Carolina State Board of Dental Examiners has repeatedly invoked the concept of federalism in support of its argument that this Court should grant the Board state-action immunity. *See* Pet'r's Br. 2, 12-14, 16-21, 23, 29, 31-34, 42, 47-48, 52, 55-59. Public choice theory calls the Board's reliance on "federalist" concerns into question, because it predicts not only that there is little correlation between the views of North Carolinians and the self-serving policies enacted by the Dental Board, but also that North

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[3] For additional background on public choice economics, *see generally* William F. Shughart II, *Public Choice*, *in The Concise Encyclopedia of Economics*, http://www.econlib.org/library/Enc/PublicChoice.html (last visited Aug. 4, 2014).

Carolinians are likely to be harmed by those policies and have little practical chance of repealing them.

For purposes of explaining the dynamics of public choice theory, *amici* will use the example of the lobbying for and passage of anticompetitive laws. But throughout the following discussion, it should be kept in mind that these dynamics are exacerbated in this case. Simply put, North Carolina's licensed dentists have little need to *lobby* for anticompetitive laws because they have the practical ability to write their own.

Anticompetitive regulations can take many forms, but an increasingly common form is occupational licensure. These laws often serve primarily to protect members of the regulated industry, with no discernable benefit to consumers or the public, and are not justified under the purported rationale of consumer protection. On the contrary, by raising prices and reducing the options available to consumers, many regulations have a net negative effect. *See* Morris M. Kleiner, *Occupational Licensing*, 14 J. Econ. Persp. 189 (2000) (summarizing many studies).

Public choice economics helps to explain the prevalence of such laws. It is widely accepted that government regulations that restrict competition and entry into a particular industry (1) cause prices to increase above the competitive market price and (2) allow industry participants to reap long-term economic profits. Unsurprisingly, such regulations are thus actively sought by particular industries and are "designed and

operated primarily for [the industry's] benefit." George J. Stigler, *The Theory of Economic Regulation*, 2 Bell J. Econ. & Mgmt. Sci. 3 (1971); Milton Friedman, *Capitalism & Freedom* 140 (1962) (observing that "[t]he pressure for [occupational licensing] invariably comes from members of the occupation itself" and not consumers or the public).

This process of special interests lobbying governments to impose anticompetitive regulations is known as "rent seeking." That term, in this context, refers to an industry's ability, through an anticompetitive regulation, to raise prices above the price that would be charged in an otherwise open market. Nobel laureate James Buchanan defined "rent" as "that part of the payment to an owner of resources over and above that which those resources could command in any alternative use," or "receipt in excess of opportunity cost." James M. Buchanan, *Rent Seeking and Profit Seeking, in Toward a Theory of the Rent-Seeking Society* 1 (1980). A monopoly profit is one example of a "rent," as used herein.

Economists have long recognized that, when it comes to rent seeking, smaller, homogenous interest groups – such as members of a specialized trade – frequently have a comparative advantage in the political process relative to larger, more heterogeneous and diffuse groups such as consumers and the public at large. *See generally* Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (1965). Members of a small interest group stand to make a substantial economic gain from

securing favorable legislation. Hence, members have an incentive to inform themselves regarding laws and regulations that affect their industry and to organize to secure enactment of favorable legislation or block legislation adverse to their interests. John O. McGinnis, *Our Supermajoritarian Constitution*, 80 Tex. L. Rev. 703, 735 n.137 (2002) (observing that the "intense common concerns" of special interest groups "help them overcome organizational difficulties and give them more influence than their numbers warrant").

This advantage is especially pronounced in industries governed by professional licensing. First, members of professional networks are often already organized by trade associations or otherwise, thereby reducing the transaction costs of redirecting their organizational resources (money and manpower) toward political lobbying efforts. Second, such professional organizations also often have an internal communications infrastructure. Through newsletters, e-mail lists, regular meetings, and the like, members can be educated about relevant issues and proposed legislation with relative ease. This greatly reduces the time and money that would need to be spent for any individual to remain informed and motivated to act, overcoming problems of rational ignorance within the profession.[4] Third, licensed professions are

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[4] "Rational ignorance" is a term used to describe situations in which an individual chooses not to pay attention to certain information because paying attention has costs in time and effort

(Continued on following page)

usually largely self-governing, which gives members an opportunity to enact anticompetitive regulations to benefit their members at the expense of the public with little public or legislative oversight.

By contrast, consumers generally face significant collective-action problems in opposing anticompetitive regulations. The costs of anticompetitive regulations are spread thinly across consumers, principally in the form of marginally higher prices, giving each individual consumer little incentive to learn about and organize to oppose every anticompetitive or protectionist regulation. Each member of the public is thus "rationally ignorant" about many anticompetitive regulations that apply to scores of products and services they buy.

Thus, because of industries' "superior ability to organize in the political process relative to consumers, consumer interests are often subservient to industry interests in the regulatory process." Cooper, *supra*, at 1100; Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & Econ. 211, 212 (1976) ("A common[,] though not universal, conclusion has become that, as between the two main contending interests in regulatory processes, the producer interest tends to prevail over the consumer interest."). The result is that consumers often have little hope of stopping the enactment of anticompetitive

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and the benefits to that individual of paying attention are too small to justify the cost.

regulations that force them to pay higher prices for fewer choices.

C. All of these concerns are heightened in this case due to North Carolina's for-dentists, by-dentists regulatory scheme.

The foregoing discussion has concerned the power of concentrated interest groups to secure passage of anticompetitive legislation in spite of the harms that legislation may visit on consumers. But, as mentioned earlier, all of these concerns are magnified when a concentrated interest group is not merely lobbying for anticompetitive legislation, but is instead actually writing the rules by which others will be allowed to compete with them. Once given the power of self-regulation and the power to control entry into an occupation, licensed professionals have a strong incentive to expand the scope of their governmental monopoly to further protect their economic interests.

Unfortunately, the same failures of the political process that produce special-interest regulations explain why these regulations, once enacted, are so immune to correction or repeal through legislative processes. Because legislative efforts must survive multiple roadblocks to the passage of legislation (often referred to as "veto gates"), well-organized special interests can even more easily frustrate the repeal of special-interest laws than they could enact the laws in the first place. *See* Maxwell L. Stearns & Todd J. Zywicki, *Public Choice Concepts and Applications in*

Law 72 (2009) (explaining that "'veto gates' are in place to slow down or to stop legislation that benefits the public at large at a cost borne largely or entirely by a narrow interest group").

Thus, within the vaguely defined scope of North Carolina's broadly worded dental practice act, the members of the Dental Board have the practical ability to enact nearly unrepealable regulations that fence out competitors. In doing so, they are not directly accountable to any elected official or the voting public. Instead, they are primarily accountable to their colleagues – the fellow dentists who elected them and who will also benefit from any anticompetitive regulations they enact. The scheme is ripe for self-dealing. And, as explained in the following section, the burgeoning market for teeth-whitening services provides an opportunity for just that.

II. Dental Boards Across the Country Are Behaving Precisely as Public Choice Economics Predicts, Using Government Power to Grant Dentists a Lucrative Monopoly on Teeth Whitening.

Teeth whitening is a lucrative business. The record below indicates that more than 80 percent of dentists offer teeth-whitening services. *See* Complaint Counsel's Proposed Final Stipulations of Law, Fact, and Authenticity at 7, *In re N.C. Bd. Of Dental Exam'rs*, No. 9343 (F.T.C. Feb. 8, 2011), *available at* http://www.ftc.gov/os/adjpro/d9343/110208ccproposedfinalstip.pdf.

The American Academy of Cosmetic Dentistry reported that in 2006 its members performed, on average, 70 teeth-whitening procedures for annual revenues of $25,000 per dentist, or $350 per procedure. Angela C. Erickson, *White Out: How Dental Industry Insiders Thwart Competition from Teeth-whitening Entrepreneurs* 2 (2013), *available at* http://www.ij.org/images/pdf_folder/other_pubs/white-out.pdf (hereinafter *White Out*).

Because teeth whitening is such a lucrative business, dentists have much to lose if non-dentists are permitted to compete with them for the provision of teeth-whitening services. This is especially true given that non-dentists offer markedly lower prices for teeth-whitening services – typically under $150. *Id.* at 2.

Public choice economics predicts that a concentrated interest group such as licensed dentists is likely to respond to these facts by seeking the passage of legislation or regulations that will restrict entry into the market for teeth whitening, even if those regulations are ultimately harmful to entrepreneurs who are shut out of the market and consumers who are forced to pay higher prices for fewer choices. As explained below, that is precisely what has happened: Throughout the country, dentists and dental boards have aggressively – and successfully – pursued policies that promote the narrow financial interests of their members, rather than any legitimate governmental interest.

A. State restrictions on non-dentist teeth whitening have spread in recent years, largely through the efforts of state dental boards.

Between 2005 and 2011, at least 29 states and the District of Columbia took legal action to restrict teeth whitening to licensed dentists. *White Out* at 7-8, 14-15, 18, 21 & Tables 1, 2, 3 & 4. The most common tactic was the one employed by the North Carolina State Board of Dental Examiners: the cease-and-desist letter. The dental boards of 24 states and the District of Columbia sent nearly 200 letters to non-dentist teeth-whitening businesses, claiming they were violating state law and urging or ordering them to shut down, often with the threat of fines or other legal penalties. *Id.* at 17-18.[5] Although the North Carolina State Board of Dental Examiners was the most aggressive, sending 47 cease-and-desist letters, it was by no means alone: The Kansas dental board sent 39 such letters, and Iowa's board sent 20. *Id.* at 18, Table 3.

As in North Carolina, all 25 dental boards sent cease-and-desist letters whose only legal basis was the boards' own interpretation of broadly worded statutes that did not explicitly prohibit non-dentist teeth whitening.[6] Typically, boards pointed to vague

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[5] At least nine states went further and sought injunctions to shut down teeth-whitening entrepreneurs. These efforts met with mixed success. *White Out* at 20-21.

[6] This number can be calculated by comparing the timing of legislation restricting teeth whitening to licensed dentists and

(Continued on following page)

statutory language in dental practice acts defining "dental service of any kind" or treatment of a dental "condition" as the exclusive province of licensed dentists. *Id.* at 20.

Meanwhile, dental boards pursued both policy and legislative changes aimed at outlawing teeth whitening outside dental offices. By 2011, 11 state boards had taken the formal position that teeth whitening is the practice of dentistry, while another three adopted policies that appear to restrict teeth whitening but are either unclear or are not being enforced. *Id.* at 7-8.[7] Eight states passed legislation purporting to sweep teeth whitening into the practice of dentistry, and dental boards often proposed or supported their passage. *Id.* at 13-14. Dental boards in Alabama, Iowa, Kentucky, Minnesota, Nevada, New Hampshire, and North Dakota initiated legislative efforts, often by drafting bills. *Id.* at 13. At least two

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the timing of cease-and-desist letters as shown in *White Out* Tables 1 and 3. As these tables illustrate, 20 state dental boards sent cease-and-desist letters even though the legislatures of those states have never adopted a clear prohibition on non-dentist teeth whitening. Dental boards in another five states sent cease-and-desist letters *before* the legislatures of those states adopted a clear prohibition on non-dentist teeth whitening.

[7] One state board, Ohio's, explicitly permits non-dentist teeth whitening. *White Out* at 15. Delaware's board told one whitening business its procedure did not fall under the practice of dentistry; the board later adopted a policy that makes the application of teeth-whitening products illegal. *Id.* at 9-10, 16. Vermont's board told a business that teeth whitening was outside its purview. *Id.* at 16.

boards, in Nevada and Arizona, employed lobbyists to secure legislation restricting teeth whitening to licensed dentists. *Id.*

B. As public choice theory predicts, the rash of restrictions on non-dentist teeth whitening was driven by the economic self-interest of dentists, not the public interest.

Legal efforts to shut down non-dentist teeth-whitening businesses bear the hallmarks of classic "rent seeking" under public choice theory: They were initiated and backed by a well-organized network of dental interests with a sophisticated communications infrastructure, as well as a greater financial incentive to bend public policy to its own ends than consumers have to organize in opposition. Moreover, through state boards that oversee the profession, licensed dentists enjoy unique access to the levers of public power.

Indeed, as legal restrictions on teeth whitening flourished, dental boards were anything but disinterested administrators. Not only are most board members licensed dentists or hygienists, they also have deep ties to a constellation of dental organizations. *White Out* at 11-12. In some states, board members are nominated by the state dental association, and members often belong to or have served on the boards of their state associations. *Id.* at 11. State dental board members have their own professional organization, the American Association of Dental Boards

("AADB"), as do the employees of state boards – the American Association of Dental Administrators ("AADA"). *Id.* The AADB is housed in the headquarters of the American Dental Association ("ADA"), a 400-employee organization whose membership comprises 70 percent of licensed dentists. *Id.* All three groups hold their annual conferences consecutively at the same location, and the ADA not only sponsors and hosts the boards' and administrators' annual midyear meetings, its president has also spoken at them, urging board members to regulate teeth whitening. *Id.* at 11-12.

Thanks to annual conferences and meetings, as well as online message boards and e-mail lists maintained by the AADB and AADA, dental board members and board employees enjoy a nationwide communications network that teeth-whitening entrepreneurs and their customers cannot hope to match. *Id.* at 12. Board members and board attorneys have used these forums to keep each other abreast of policy and legal developments, share enforcement strategies, and collaborate on statutory language to define teeth whitening as dentistry. *Id.*

Private dental interests were also enthusiastic supporters of outlawing or shutting down non-dentist teeth-whitening businesses. In 2008, the American Dental Association's House of Delegates adopted a resolution calling on members to undertake legislative and regulatory efforts to restrict teeth whitening by non-dentists, and public records indicate that many state associations and individual members did

so. *Id.* at 13-15, 17-20. Licensed dentists, dental students, and state dental associations engaged in letter-writing campaigns, testified before legislative committees, and employed lobbyists to back legislation restricting teeth whitening. *Id.* at 13-14.

The dental industry also pressured state boards, primarily by filing complaints and urging legal action against teeth-whitening businesses. *Id.* at 15, 17-19. Of 97 such complaints from nine states, 93 charged only that businesses offering teeth whitening were engaged in the unlicensed practice of dentistry; only four were genuine consumer complaints. *Id.* at 23-24.[8] At least 81 percent of the complaints were filed by dental interests – dentists, hygienists, dental associations, or dental boards themselves – while only four percent came from consumers; the other 15 percent were anonymous. *White Out* at 19.

While dentists have much to gain from capturing the teeth-whitening market, consumers have relatively li[illegible]ncentive to organize in opposition. Even if mos[illegible]sumers prefer the convenience and lower cost of non-dentist teeth-whitening services, those limited benefits are hardly enough to motivate very many to put personal time and resources into keeping abreast of – let alone lobbying against – proposed

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[8] The Institute for Justice sought complaints from all 50 states and the District of Columbia for 2007 through 2011. Seven states and D.C. reported no relevant complaints, and the other 34 states withheld complaints pursuant to state open-records laws. *White Out* at 4, 23.

regulations. And in fact, consumers rarely do: As legislatures and state boards across the country were considering new restrictions, only once did consumers speak out at all. Significantly, they opposed the proposed regulations.[9]

Non-dentist teeth-whitening businesses have substantially more at stake but, being small and new, they lack the organization, communications infrastructure, and resources of the dental industry, and thus their policy successes have been limited.[10] Of course, even if teeth-whitening entrepreneurs and consumers could match the resources and organization of dental interests, they would have virtually no ability to affect the decisions of state dental boards that face limited or no democratic accountability.

Without fail, dental interests claim that teeth-whitening restrictions protect consumer health and safety. *Id.* at 13-14. Yet the same products sold by teeth-whitening businesses can be bought and used

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[9] A survey of public records detailing the adoption of legislation and regulations on teeth whitening nationwide identified one instance of consumer advocacy, when six teeth-whitening customers filed comments with the Kansas Dental Board opposing new restrictions. *White Out* at 11-17.

[10] The Council for Cosmetic Teeth Whitening, a trade group and the only voice countering dental interests in debates over the regulation of teeth whitening, spoke out against and helped stop proposed legislation in Minnesota and secured a rare legislative victory when Illinois legalized non-dentist teeth whitening. *White Out* at 11, 13. Few other efforts by teeth-whitening businesses to oppose regulation were successful. *Id.* at 12.

by anyone at home, without instruction, supervision, or a prescription, and they are regulated by the U.S. Food and Drug Administration as cosmetics. *Id.* at 4. Unsurprisingly, dental interests rarely point to actual evidence of consumer harm. *Id.* at 13-14. Indeed, during a five-year period when dental associations were urging dentists to report harm from teeth whitening, only four genuine consumer complaints were filed across 16 states and the District of Columbia. *Id.* at 23-24. None of the complaints alleged permanent injury, only varying degrees of gum irritation – a temporary side effect that is common to teeth whitening wherever it is done, including dental offices. *Id.*

It should come as no surprise, then, that the clamor to restrict teeth whitening has come exclusively from dental interests, not consumers. Licensed dentists have every incentive to ban outsiders from a profitable trade, the organizational means to lobby effectively, and, through state boards, the ability to directly implement public policy. As public choice theory predicts, the growth of teeth-whitening restrictions reflects neither consumer demand nor the public interest, but rather the economic interests of licensed dentists.

CONCLUSION

This Court has recognized that "[f]ederalism is more than an exercise in setting the boundary between different institutions of government for their

own integrity." *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011). It is also a crucial means of protecting "individual liberty" by, among other things, ensuring "greater citizen involvement in democratic processes." *Id.* (internal quotation marks omitted). Despite the North Carolina State Board of Dental Examiners' frequent references to the concept of "federalism," the reality of this case is that – just as public choice economics predicts – the Board has enacted an anti-competitive policy that reflects the narrow interests of an unelected and unaccountable group of industry insiders, rather than any legitimate governmental interest. Accordingly, for the reasons stated above, the decision of the U.S. Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 13-534

In the Supreme Court of the United States

NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF WE ALL HELP PATIENTS, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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BRIEF OF WE ALL HELP PATIENTS AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENT[1]

INTERESTS OF AMICUS CURIAE

We All Help Patients, Inc. is a nonprofit coalition of healthcare providers—including acupuncturists, midwives, massage therapists, and doctors of medicine, osteopathy, naturopathy, and chiropractic—patients, consumer advocates, and concerned members of the public. We All Help Patients was founded by Dr. Yvoune Petrie, D.C., out of recognition that a healthcare myth has been and continues to be perpetuated to enrich a segment of the medical establishment at the expense of the public health. The brunt of this broken system is borne by those who are least capable of fixing it: people with illnesses that can be treated by methods the medical establishment does not sanction.

The coalition seeks to help patients get better, feel better, and stay better without resorting to a scalpel and a prescription pad. It also seeks to establish a new standard of care under which all healthcare providers incorporate methods that advance health and that are uniformly covered by health insurance. By collaborating with the full spectrum of healthcare providers and patients, the coalition hopes to create a system in which complementary and alternative medicine

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1. No counsel for any party has authored this brief in whole or in part, and no person other than *amicus*, its members, or its counsel have made any monetary contribution intended to fund the preparation or submission of this brief. The parties' letters consenting to the filing of amicus briefs have been filed with the Clerk of Court.

practitioners can contribute to the health of their patients according to their training and scope without fear or persecution.

We All Help Patients thus has a significant interest in this case because state-sanctioned medical boards made up of financially interested professionals present one of the most significant barriers to complimentary and alternative medicine.

INTRODUCTORY STATEMENT AND SUMMARY OF ARGUMENT

The federal antitrust laws—the "Magna Carta of free enterprise"—protect and nurture competition. *United States v. Topco Assocs.*, 405 U.S. 596, 610 (1972). Competition in healthcare, however, suffers because over time medical associations and their members have acquired market power by influencing the composition and power of state licensing boards, who in turn keep other types of healthcare providers from invading the "turf" of these powerfully entrenched professionals. Without vigorous antitrust enforcement, patients will pay higher prices for fewer healthcare options.

The "independent centers of decisionmaking" here—the dentists on the North Carolina State Board of Dental Examiners—are financially interested private parties. This is the crucial fact that requires the Board to prove active state supervision to obtain state-action immunity. The proper antitrust analysis of any state or private entity must focus on these functional "independent centers of decisionmaking," not on formal labels or corporate or state structures that a defendant can manipulate. *American Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 191 (2010). Applying the active-state-supervision element

in these circumstances protects the limiting policy of state-action immunity that only the state sovereign—not private individuals or groups—can displace the national policy of competition that our federal antitrust laws embody.

1. Like all antitrust exemptions, courts strictly limit and disfavor state-action immunity. *FTC v. Phoebe Putney Heath Sys., Inc.*, ___ U.S. ___, 133 S. Ct. 1003, 1010 (2013). This limited exemption exists solely to allow the states as sovereigns to regulate their economies and provide essential services to their citizens, without interference by a law meant to apply to market not regulatory conduct. *Id.* at 1016. At the same time, states may not "give immunity to those who violate the Sherman Act by authorizing them to violate it." *Parker v. Brown*, 317 U.S. 341, 351 (1943). Courts must consider these limits when interpreting and applying the state-action immunity elements developed by *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105, (1980).

2. This Court need not definitively answer the broad question of whether state agencies must prove active state supervision for immunity. Rather, the Court should apply the analysis of *American Needle, Inc. v. National Football League*, 560 U.S. 183 (2010). In that case, the Court looked beyond the legal formalities of a single entity to determine whether it comprised "independent centers of decisionmaking," which is the unit of analysis for competition under the Sherman Act. *Id.* at 196. The Court should thus examine whether these units of competition—dentists who sit on the North Carolina State Board of Dental Examiners—have private interests. If the independent centers of decisionmaking that engage in anticompetitive

conduct are private rather than public, there is no assurance that the acts are acts of the sovereign state. *See Phoebe Putney*, 133 S. Ct. at 1011.

3. Whether board members are elected or appointed doesn't matter under a proper analysis. Rather than introduce a highly factual, case-by-case analysis that elevates form over function and invites scrutiny of state political processes, this Court should consider whether the independent centers of decisionmaking—the Board members—have private incentives.

4. Professional-licensing boards are one of the fastest-growing labor institutions in the U.S. economy. They often consist primarily of members of the regulated profession—independent centers of decisionmaking. These boards have an inherent conflict of interest between their public duties and private interests. They cannot be trusted to determine the scope-of-practice for other professions because they have private pecuniary interests and are often beholden to their peers. Their actions are usually final and not subject to approval by a disinterested state official. Rather, they are subject only to limited and deferential judicial review that does not determine whether the anticompetitive conduct actually furthers state regulatory policies.

5. Professional-licensing boards typically don't have clear state-law delegations of authority to expand their monopoly. Thus, this Court should be skeptical at the outset that such self-aggrandizing acts are the state sovereign's own. Instead, the Court should find active supervision only where that supervision comes in the form of mandatory, pre-injury review of the particular anticompetitive act.

6. This Court's decision requiring proof of active state supervision in this case is vital to the

nation's global standing in healthcare. The traditional medical establishment has long used its influence to prevent healthy competition. Today, entrenched market participants—allopathic healthcare providers—wield the full power of their respective states to suppress competition from complimentary and alternative medicine (CAM) practitioners instead of protecting the public health. Innovations in CAM care have improved patient outcomes, decreased the need for medications, and reduced costs. With such high stakes, this Court must ensure that the national policy of competition is not undermined by private interests hiding behind the veil of state sovereignty to avoid scrutiny of their self-interested anticompetitive acts.

ARGUMENT

I. An Entity that Consists of Market Participants Must Prove Active State Supervision to Invoke State-Action Immunity.

A. State-action immunity is only available when the State owns the anticompetitive act, as a sovereign.

The state-action immunity from the federal antitrust laws is strictly limited and disfavored. *FTC v. Phoebe Putney Heath Sys., Inc.*, ___ U.S. ___, 133 S. Ct. 1003, 1010 (2013). This Court just reiterated in *Phoebe Putney* the underlying policy behind state-action immunity that only the "State's sovereign capacity to regulate their economies and provide services to their citizens" can displace the " 'essential national policies' embodied in the antitrust laws." *Id.* at 1016 (citation omitted).

Variations of the test this Court developed in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), answer the question whether the anticompetitive act derives from the state as sovereign. First, the challenged restraint must be "clearly articulated and affirmatively expressed as state policy." *Id.* at 105. Second, the policy must be "actively supervised by the State itself." *Id.*

Courts should not, however, apply these factors in a vacuum, parsing the plain language of each. Instead, they are a means to the specific policy underlying the state-action immunity doctrine, not ends by themselves. This Court has explained, for instance, that both elements are "directed at ensuring that particular anticompetitive mechanisms operate because of a deliberate and intended state policy." *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992); *see also* Jarod M. Bona, *The Antitrust Implications of Licensed Occupations Choosing Their Own Exclusive Jurisdiction*, 5 U. St. Thomas J. L. & Pub. Pol'y 28, 37 (2011) ("The real battle is to determine whether a particular challenged action actually flows from the state acting as sovereign or from some other basis.").

In *Phoebe Putney*, this Court in fact developed the first factor—clear articulation—toward the doctrine's policy by holding that when a state offers a general delegation of power to a sub-state entity, immunity fails because the State's action does not show that it "affirmatively contemplated" and "articulated" the anticompetitive acts. 133 S. Ct. at 1016–17. That is, it wasn't clear that the anticompetitive conduct was the State's own—as a sovereign—rather than merely the acts and decisions of a political subdivision that is not sovereign itself. *Id.* at 1010–14.

The core policy of this immunity doctrine also incorporates the consistently reaffirmed maxim from *Parker v. Brown* that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it." 317 U.S. 341, 351 (1943); *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 343 (1987); *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 602 (1976). States as sovereigns may engage in anticompetitive conduct "to regulate their economies and provide services to their citizens." *Phoebe Putney*, 133 S. Ct. at 1016. But they may not transfer this immunity—as though it were an alienable commodity—unto others to exercise. The policy behind state-action immunity requires that the damage to our nation's competition policy must come from an intentional decision by the sovereign state itself. This is a cost of federalism that is narrowly circumscribed.

This Court previously relieved municipalities from the burden of proving the second *Midcal* requirement—active state supervision—because they "have less of an incentive to pursue their own self-interest under the guise of implementing state policies." *Phoebe Putney*, 133 S. Ct. at 1011; *see Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46 (1985). Thus, this Court determined that when there is no private interest involved in the decisionmaking process, it would trust the public actor with properly applying the specifically articulated sovereign wishes with less supervision.[2]

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2. The municipality, however, is not worthy of this trust when it is acting as a commercial participant instead of a regulator because it has its own private interests. This Court declined to consider the "market-participant exception" to state-action immunity in *Phoebe Putney*, 133 S. Ct. at 1010 n. 4. *See* Jarod M. Bona & Luke Anthony Wake, *The Market-Participant*

This Court expressly reserved the question of whether state agencies must prove active state supervision for immunity. *Id.* at 46 n.10. As explained below, this Court need not fully answer this question because it can dispose of this case on more narrow grounds consistent with the policy underlying the state-action immunity doctrine.

B. The application of the active state supervision requirement depends not on the form of the entity, but on the nature of the independent center of decisionmaking.

This Court need not answer the question—once and for all—whether the active-state-supervision element applies to state agencies because this case involves a unique entity made up of market-participants that are "independent centers of decisionmaking." *American Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 196 (2010); *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769 (1984).

Indeed, this Court's analysis in *American Needle* requires a simple answer here. In that case, the Court considered whether concerted action could be taken by a single entity—a corporation formed by the thirty-two National Football League teams to manage their intellectual property. *American Needle*, 560 U.S. at 186. The first section of the Sherman Act only applies to contracts, combinations, or

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Exception to State-Action Immunity from Antitrust Liability, 23 Competition 156 (2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2402444 (advocating a market-participant exception to state-action immunity).

conspiracies, so if the Section 1 defendant is a "single entity" under the antitrust laws it escapes antitrust scrutiny. *Id.* at 188–89. In answering the question, this Court "eschewed" a formalistic approach focused on the type of entity "in favor of a functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate." *Id.* at 191.

This Court explained, for example, that it has "repeatedly found instances in which members of a legally single entity violated § 1 when the entity was controlled by a group of competitors and served, in essence, as a vehicle for ongoing concerted activity." *Id.* Notably, this Court further stated that it has "similarly looked past the form of a legally 'single entity' when competitors were part of professional organizations or trade groups." *Id.* at 192. Among other cases, this Court cited *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), which, like the present case, involved a state-licensing entity with a private professional membership accused of anticompetitive conduct. *American Needle*, 560 U.S. at 192 n.3.

American Needle thus confirmed that the unit of analysis for antitrust purposes is the "independent center of decisionmaking." *Id.* at 196. This makes sense because a federal policy of competition underlies the antitrust laws and the independent center of decisionmaking is, in fact, the unit of competition. *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978) ("The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services."); *American Needle*, 560 U.S. at 195 ("The key is whether [the concerted action] joins together separate decisionmakers."). A

"contract, combination, or conspiracy" deprives the market of these independent decisionmaking centers and is therefore scrutinized under Section 1 of the Sherman Act. *Id.* at 199.

Similarly, here, determining whether the active-state-supervision requirement applies to the North Carolina State Board of Dental Examiners must occur by examining the interests of the independent centers of decisionmaking—the unit of analysis for competition. Consistent with this approach, this Court rejected a state-action immunity analysis centered on the form or label of the broader entity in *Goldfarb*, where "the State Bar is a state agency for some limited purposes." 421 U.S. at 791. This "state entity" classification did not allow it "to foster anticompetitive practices for the benefit of its members." *Id.* Thus, the Court need not consider the public or private nature of the dental-board entity itself to derive answers to the issues in this case.

Instead, similar to *American Needle*, this Court should examine whether the units of competition—the independent decisionmakers—are private interests or, as with at least some municipalities, "have less of an incentive to pursue their own self-interest under the guise of implementing state policies." *Phoebe Putney*, 133 S. Ct. at 1011.

Here, each of the dental-board members are, like the teams in *American Needle*, part of separate and "independently owned and independently managed business[es]." 560 U.S. at 196; *see also* Pet. App. 4a–5a, 72a. That isn't disputed. Thus, the "independent centers of decisionmaking" in this case are indisputably private interests, which this Court in *Phoebe Putney* reiterated must satisfy *Midcal's* active state supervision requirement. 133 S. Ct. at 1011.

This conclusion also follows from the policies underlying state-action immunity. Only the state sovereign can displace the "essential national policies" embodied in the antitrust laws, and the *Midcal* elements seek to ensure that any anticompetitive act operates "because of a deliberate and intended state policy." *Ticor Title*, 504 U.S. at 636.

If the independent units of decisionmaking that engage in the anticompetitive conduct are private rather than public, there is no assurance—without active state supervision—that the acts are, indeed, the acts of the state sovereign. *Phoebe Putney*, 133 S. Ct. at 1011–12 (acknowledging that private parties have an incentive to pursue "their own self-interest under the guise of implementing state policies"); *Patrick v. Burget*, 486 U.S. 94, 101 (1988) ("Absent such a program of supervision, there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests."); Einer Richard Elhauge, *The Scope of Antitrust Process*, 104 Harv. L. Rev. 667, 672 (1991) ("[T]hose who stand to profit financially from restraints of trade cannot be trusted to determine which restraints are in the public interest and which are not.").

Just as importantly, allowing the state to deputize private independent centers of decisionmaking to harm competition would contravene the policy that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it." *Parker*, 317 U.S. at 351. Active state supervision in these circumstances ensures that any displacement of our national policy of competition comes from the state sovereign itself.

Otherwise, a state could easily sanction private anticompetitive conduct by, for example, forming a commission or some other public agency made up of representatives from a particular favored industry in the state to set prices or exclude competitors.

Perhaps, for example, the State of Michigan decides to form a state agency or board consisting of representatives of major car manufacturers, which are important business citizens of the State. If the unit of analysis were the state entity itself, a state could manipulate it so it passes scrutiny as a "state" entity rather than a private entity. The car manufacturers would have a heyday with this state-sponsored cartel, which the federal antitrust laws couldn't touch. And the State of Michigan and its citizens are happy because car-manufacturer victories over others in the vertical chain of competition benefit Michigan and its citizens.

But if a court were to look instead to the "independent centers of decisionmaking," it will observe that the car-manufacturer representatives have an "incentive to pursue their own self-interest under the guise of implementing state policies." *Phoebe Putney*, 133 S. Ct. at 1011. The antitrust laws would thus govern the conduct, supporting the state-action immunity policy that a state cannot give others immunity to violate the federal antitrust laws. *Parker*, 317 U.S. at 351

C. The route that private interests travel to a quasi-state entity is irrelevant to whether *Midcal's* active state supervision requirement applies.

The Board members in this case were elected by other dentists. *N.C. State Bd. of Dental Examiners*

v. FTC, 717 F.3d 359, 364 (4th Cir. 2013). But that fact does not affect the proper analysis here. First, what matters is whether the "independent centers of decisionmaking" are private actors with corresponding pecuniary self-interests. An appointment by a government official does not remove strategic private or industry incentives and behavior from the anticompetitive activity.

Second, it is likely that appointments will originate from either a financially ambitious professional or trade association that recommends nominations to a state official. *See, e.g.*, Idaho Code Ann. § 54-1805(2)(a)(b) (West 2013) (governor must appoint from nomination pool submitted by private medical associations); N.Y. Pub. Health Law § 230(1) (McKinney 2013) (85% of state medical board appointments must come from nominations by private medical associations). These nominees are likely beholden to the private association of their fellow professionals as much as if they were elected.

Third, if the route that a financially interested professional took to a state or quasi-state agency were relevant, courts would have to examine the behind-the-scenes election and appointment processes in each case to make what are likely to be conflicting and subjective judgments about individual government-official motivations. Federal courts would be required, in these circumstances, to delve into the sensitive workings of the state political process. *See Hallie*, 471 U.S. at 44 n.7. This would also introduce a highly factual issue and great uncertainty into every federal antitrust case involving a licensing board or other agency made up of private interests. It isn't apparent that boards full of elected members are necessarily less likely to pursue the state sovereign's goals than members that

are appointed, particularly when a private trade group, in practice, runs the appointment-nomination process.

Finally, adopting such a distinction between appointments and elections would elevate form over function, an approach that this Court rejected in *American Needle.*, 560 U.S. at 191. What matters is not the political form of how private interests came to the board or agency, but how they function in practice, including their private interests and incentives.

II. Active State Supervision Requires More than Some State Involvement Through Limited Agency or Judicial Review Procedures.

A. The Purpose of the Active Supervision Requirement.

As we explained above, only those acts considered a state's own, as sovereign, are exempt from federal antitrust scrutiny. *See Goldfarb*, 421 U.S. at 791 ("It is not enough that anticompetitive conduct is 'prompted' by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign."). To this end, the active supervision requirement maintains a state's flexibility "to benefit their citizens through regulation," *Ticor Title*, 504 U.S. at 637, while ensuring that the state itself "exercise ultimate control over the challenged anticompetitive conduct." *Patrick*, 486 U.S. at 101. Without this requirement, regulatory schemes that empower those other than the sovereign to act anticompetitively would lack accountability mechanisms to ensure that those acts,

"in the judgment of the State, actually further state regulatory policies." *Id.* Clear articulation, standing alone, would lead the state-action immunity doctrine to "become a rather meaningless formal constraint." *Ticor Title Ins. Co.*, 504 U.S. at 637. This disfavored exception would eclipse the rule and defeat the "national policy in favor of competition." *Midcal*, 445 U.S. at 106.

B. The Structure of State Licensing Boards.

Licensing boards such as the North Carolina Board of Dental Examiners usually consist of members of the regulated profession—independent centers of decisionmaking. This creates an opportunity for these financially interested professionals to expand their scope of practice to exclude competition from other occupations. Clark C. Havighurst, *Contesting Anticompetitive Actions Taken in the Name of the State: State Action Immunity and Health Care Markets*, 31 J. Health Pol. Pol'y & L. 587, 596 (2006) (explaining that licensing boards may have little enthusiasm for competition). Besides their financial interest, these board members are also affected by the private financial interest of their peers through esprit de corps, social pressure, or their appointment or election.

Thus, they "cannot be trusted to decide which restrictions on competition advance the public interest [in the way] disinterested, politically accountable actors can." Einer Richard Elhauge, *The Scope of Antitrust Process*, 104 Harv. L. Rev. 667, 668 (1991). Absent a robust active supervision requirement, these "unsupervised self-interested boards [are] subject to neither political nor market

discipline to serve consumers' best interests." *In re N.C. Bd. of Dental Exam'rs*, 151 F.T.C. 607, 632 (2011).

Professional-licensing boards are ubiquitous. *See* Morris M. Kleiner & Alan B. Krueger, *The Prevalence and Effects of Occupational Licensing*, 48 British J. of Indus. Rel., 676, 676 (2010) (describing occupational licensing as "[o]ne of the fastest-growing yet least understood institutions in the US [labor] market"). And because they consist of independent centers of decisionmaking, they have the potential to engage in "what is essentially private anticompetitive conduct" under "the gauzy cloak of state involvement." *Southern Motor Carriers Rate Conf., Inc. v. United States*, 471 U.S. 48, 57 (1985) (quoting *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106 (1980)). These Boards, with financially interested members, have inherent conflicts of interest. *Hallie*, 471 U.S. at 45 ("A private party may be presumed to be acting primarily on his or its own behalf."); 1A Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 227b, at 501 (3d ed. 2009) (stating that a "decisive coalition made up of participants in the regulated market" should be classified as "private" for state action purposes); *see also Gibson v. Berryhill*, 411 U.S. 564, 579 (1973) ("[T]hose with substantial pecuniary interests in legal proceedings should not adjudicate these disputes.").

Absent a rigorous program of supervision under which disinterested "state officials have and exercise power to review particular anticompetitive acts there is no realistic assurance" that the anticompetitive conduct the boards engage in is actually the state's own. *Patrick*, 486 U.S. at 101.

C. Professional-licensing boards are not Actively Supervised through Judicial Review

In *Patrick v. Burget*, this Court held that state judicial review of hospital privilege-termination proceedings "falls far short of satisfying the active supervision requirement," but reserved the broader question of "whether state courts, acting in their judicial capacity, can adequately supervise private conduct for purposes of the state-action doctrine." *Id.* at 103–04. Instead, the Court pointed to the limited nature of the particular proceedings available in that case, which did little more than "ensure that some sort of reasonable procedure was afforded and that there was evidence" to support the finding. *Id.* at 105.

The Eleventh Circuit later held that even though Florida law comprehensively regulated a peer-review procedure terminating hospital privileges, the decision's merits were neither reviewed by disinterested agency officials nor the courts and thus were not actively supervised. The court explained that "Florida courts expressly advocate judicial restraint in this area, viewing judicial intervention as necessary or appropriate only when a peer review board uses unfair or unreasonable procedures, or when a board arbitrarily and capriciously applies its procedures." *Shahawy v. Harrison*, 875 F.2d 1529, 1536 (11th Cir. 1989).

The same is true in the area of professional-licensing boards. The actions of licensing boards are typically final and not subject to review by a disinterested state administrator. *See, e.g., Solomon v. Bd. of Physician Quality Assur.*, 845 A.2d 47, 50 (2003) (stating procedural history of appeal from

board decision); *Nelson v. Bd. of Veterinary Med.*, 662 So. 2d 1058, 1059 (Miss. 1995) (same). Rather, their decisions are subject only to the limited judicial review afforded administrative agency decisions.

Indeed, state judicial review of administrative decisions is invariably deferential when it concerns professional-licensing boards. In Arkansas, for example, courts uphold administrative decisions "if they are supported by substantial evidence and not arbitrary, capricious, or characterized by an abuse of discretion." *Arkansas Prof'l Bail Bondsman Licensing Bd. v. Oudin*, 69 S.W.3d 855, 859 (Ark. 2002) (citations omitted). In Connecticut, courts are "limited to determining whether the board acted illegally, and the court may not exercise its independent judgment " *Lillis v. Dep't of Health Servs.*, 564 A.2d 646, 649 (Conn. Super. Ct. 1989) (citing *Jaffe v. Dep't of Health*, 64 A.2d 330, 353–355 (Conn. 1949)). Other states require particular deference to an agency interpretation of a statute it administers. *See, e.g.*, *Williamson v. D.C. Bd. of Dentistry*, 647 A.2d 389, 392 (D.C. 1994) ("We deal here with an agency's interpretation of a statute it administers, to which we give particular deference."); *Maclen Rehab. Ctr. v. Dep't of Health & Rehab. Servs.*, 588 So. 2d 12, 13 (Fla. Dist. Ct. App. 1991) ("An agency's interpretation of its rules and the statutes which it is charged to administer is to be given great deference."); *LTV Steel Co. v. Griffin*, 730 N.E.2d 1251, 1257 (Ind. 2000) ("An interpretation of a statute by an administrative agency charged with the duty of enforcing [it] is entitled to great weight "); *Lippitt v. Bd. of Certification*, 88 A.3d 154, 159–60 (Me. 2014) ("[W]e generally defer to an agency's interpretation of an ambiguous regulation or statute that is within its area of expertise." (citations and

internal quotations omitted)). Iowa and Vermont take this further, granting even greater deference to a board composed of peers within the profession. *See Al-Khattat v. Eng'g & Land Surveying Examining Bd.*, 644 N.W.2d 18, 23 (Iowa 2002) ("[W]e defer to an agency's construction of statutes and rules within the agency's expertise, unless the interpretation is erroneous or unreasonable. This is particularly true in the case of statutes and regulations entrusted to agencies responsible for licensing professionals. Therefore, we generally affirm the informed decision of the agency, and refrain from substituting our less-informed judgment.") (citations omitted); *In re Porter*, 70 A.3d 915, 918 (Vt. 2012) ("We defer to an administrative agency's interpretation of statutory provisions that are within its particular area of expertise. Where the Board evaluating the professional's conduct is composed of a group of his peers, we afford the Board's decision additional deference." (citations and internal quotations omitted)).

Furthermore, judicial review of administrative decisions is usually narrow, with the burden of persuasion on the appealing party. *See, e.g.*, *Lippitt*, 88 A.3d at 159 (burden is on challenger of agency action); *Solomon*, 845 A.2d at 52 ("Appellate review of an administrative agency's decision is narrow."); *Karasik v. Bd. of Regents*, 130 A.D.2d 923, 925 (N.Y. App. Div. 1987) ("We may not substitute our judgment for that of respondent and may only inquire as to whether the record shows facts which leave no possible scope for the exercise of discretion.").

In sum, the decisions of professional-licensing boards comprising independent centers of decisionmaking are usually subject to only a "constricted review" not on the merits. *Patrick v.*

Burget, 486 U.S. 94, 105 (1988). Because the "active supervision prong of the *Midcal* test requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy," *Id.* at 101, state court review of these decisions necessarily fails to fulfill the active-supervision requirement.

D. The constitution of active state supervision.

Active supervision should require not only that a disinterested state official determine that an anticompetitive act "actually further[s] state regulatory policies," *Patrick*, 486 U.S. at 101, but that this determination occur prior to the market injury. *See* Elhauge, *supra*, at 716 (stating that "post-injury state review is insufficient because, however automatic the right to review, the effort and time necessary to invoke state review can discourage and delay vindication of the right to a competitive market."); *see also In re N.C. Bd. of Dental Exam'rs*, 151 F.T.C. 607, 632 (2011) (expressing doubt that post-injury review by political or judicial process could constitute active supervision).

Professional-licensing boards do not usually have clear authority to expand their monopoly under their legislative delegations of authority. *See* Bona, *supra*, at 46. Thus, courts engaging in a state-action immunity analysis should scrutinize that "it is the state itself—and not a self-interested board—that is expanding the zone of anticompetitive harm." *Id.* Indeed, the policy underlying state-action immunity includes a presumption against finding such expansive authority because "a state does not give

immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." *Parker*, 317 U.S. at 351.

Where professional-licensing boards engage in anticompetitive acts by expansively interpreting the scope of practice during disciplinary adjudications, active supervision should require approval from a disinterested state official whose acts can fairly be interpreted as those of the sovereign.

Professional-licensing boards that use informal threats of action to suppress competition, much like the cease-and-desist letters issued by the Board in this case, are inherently unsupervisable by state officials because such informal action evades administrative procedures and judicial review. *See N.C. Bd. of Dental Exam'rs*, 151 F.T.C. at 632.

Where professional-licensing boards use official rulemaking procedures to expand their jurisdiction, mandatory executive or legislative pre-approval review should suffice. *See, e.g.*, Nev. Rev. Stat. § 233B.067(3)–(5) (implementing mandatory pre-clearance legislative review procedures for administrative rules). But in states with administrative rulemaking-review procedures, mandatory pre-approval is uncommon. *See* Jason A. Schwartz, *52 Experiments with Regulatory Review: The Political and Economic Inputs into State Rulemakings*, Institute for Policy Integrity, N.Y.U. Law, Report No. 6 (Nov. 2010), at 86 (describing various administrative rules review mechanisms in the states). These mechanisms don't provide adequate supervision because "[t]he mere potential for state supervision is not an adequate substitute for a decision by the State." *Ticor Title* at 638. In such cases, those boards that want to expand their jurisdiction to the detriment of competitors in other

occupations must instead seek legislative amendment of their statutory jurisdiction, which would then itself become an expressed policy of the state, immune from antitrust scrutiny.

III. Without federal antitrust scrutiny, state medical boards will exclude health professionals that offer competitive alternatives to the traditional medical establishment.

"Necessity is the mother of invention." This aphorism captures the entrepreneurial and creative spirit of the American people. Americans excel at identifying needs, forming ideas, and creating novel solutions. When these solutions are not safe, effective, or economical, they shrivel and die. Our nation's antitrust laws were designed to protect these patently American ideals of innovation and competition. *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978) ("The heart of our national economic policy long has been faith in the value of competition.").

The healthcare industry is no exception. Competition and innovation can make healthcare more effective, reduce costs, increase availability, create better outcomes, and improve Americans' quality of life. But our healthcare system is hardly competitive, and the numbers prove it. The United States is ranked thirty-seventh in the world for overall health. Christopher J.L. Murray & Julio Frenk, *Ranking 37th—Measuring the Performance of the U.S. Health Care System*, 362 N. Engl. J. Med. 98, 98 (2010). Healthcare is also prohibitively expensive. Our healthcare spending—$8,680 per capita, $2.7 trillion in total, or 17.9% of GDP—is higher than any

other country. Nat'l Ctr. for Health Statistics, DHHS Pub. 2014-1232, *Health, United States, 2013*, Table 112 (2014).

Despite our nation's embarrassing global standing in health, the traditional healthcare establishment is uninterested in a solution through competition; perhaps because they fear one might be found elsewhere. Indeed, a seven-year study in Illinois shows that using complimentary- and alternative-medicine (CAM) practitioners (specifically, doctors of chiropractic) as primary-care physicians results in a marked reduction in hospital admissions, hospital stays, out-patient surgeries, the use of prescription medications, and the costs of care compared to exclusive reliance on allopathic practitioners. *See* Richard L. Sarnat, James Winterstein & Jerrilyn A Cambron, *Clinical Utilization and Cost Outcomes from an Integrative Medicine Independent Physician Association: An Additional 3-Year Update*, 30 J. Manipulative Physiotherapy 263, 267 (2007). By contrast, one of allopathic medicine's primary tools—prescription medication—is the nation's fourth leading cause of death. *See* Donald W Light, Joel Lexchin & Jonathan J. Darrow, *Institutional Corruption of Pharmaceuticals and the Myth of Safe and Effective Drugs*, 41 J. L. Med. & Ethics 590, 593 (2013).

Medical professional associations have long used their muscle and influence to prevent healthy competition. The American Medical Association's Committee on Quackery was created in 1962 to contain and ultimately eliminate competition from chiropractic care. *Wilk v. Am. Med. Ass'n*, 719 F.2d 207, 213 *adhered to*, 735 F.2d 217 (7th Cir. 1983). AMA's boycott ultimately failed and chiropractors have since been licensed in all fifty states. *See Wilk v.*

Am. Med. Ass'n, 895 F.2d 352, 356 (7th Cir. 1990). But the allopathic medical profession has found another way to exert its members' will: through state medical boards. These boards often comprise a membership dominated by medical doctors who are either elected by their peers or appointed through nomination processes controlled by private trade organizations—their state's medical associations—whose purpose necessarily is to protect their members' interests. *See, e.g.*, Idaho Code § 54-1805(2)(a), (b) (requiring governor to appoint medical board from state medical association's slate of nominees).

These entrenched market participants now suppress their competition through disciplinary proceedings, civil actions, criminal charges, and threats of all of the above. Like the North Carolina dentists who have co-opted state power to further their own pecuniary interests, allopathic practitioners can further their interests—at the expense of everyone else—only if they are shielded from federal antitrust scrutiny. They have not simply captured a regulatory arm of the state; they have commandeered it. The national policy of competition should not be set aside simply because conspirators have a particular form of political success.

State medical boards dominated by market participants are charged with protecting and advancing the public health, and they have failed. Competition, on the other hand, has a proven track record of success. Innovations in allopathic medicine such as penicillin and the cesarean section have saved millions of lives. Likewise, innovations in chiropractic care have decreased the necessity of lower-back surgery, reduced pain, improved function, and saved money. CAM has improved patient

outcomes while reducing the need for medication. Healthy competition between different types of healthcare providers—both allopathic practitioners (doctors of medicine, osteopathy, and podiatry, dentists, and nurses) and CAM practitioners (doctors of chiropractic, naturopathy, and certified professional midwives, among others)—empowers patients with choices and has resulted in new and better methods of preserving and promoting health. *See* Fed. Trade Comm'n Staff, *Policy Perspectives: Competition and the Regulation of Advanced Practice Nurses* 20 (2014) (stating scope-of-practice restrictions deprive consumers of many benefits of competition).

We ask this Court to reaffirm our nation's commitment to healthy competition and deny these financially interested, politically entrenched market participants the unwarranted reprieve they seek.

CONCLUSION

For the foregoing reasons, We All Help Patients, Inc. urges this Court to hold that the active-state supervision requirement applies when the state-action-immunity-seeking entity consists of independent centers of decisionmaking with private interests.

Respectfully submitted,

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Dated: August 6, 2014.

AMICUS CURIAE BRIEF

No. 13-534

In the Supreme Court of the United States

THE NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF *AMICI CURIAE* STATE OF WEST VIRGINIA AND 22 OTHER STATES IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether, for purposes of the state-action exemption from federal antitrust law, an official state regulatory board created by state law may properly be treated as a "private" actor simply because, pursuant to state law, a majority of the board's members are also market participants who are elected to their official positions by other market participants.

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INTEREST OF *AMICI CURIAE*

Amici Curiae—the States of West Virginia, Alabama, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Hawai'i, Idaho, Indiana, Kansas, Kentucky, Maryland, Michigan, Nebraska, North Carolina, Ohio, Oregon, South Carolina, Tennessee, Utah, and Virginia—have a significant interest in this case because the Fourth Circuit's decision punishes States for their sovereign choices as to how to staff and supervise their regulatory boards. *Amici* routinely use regulatory boards to oversee certain professions operating within their borders. And *Amici* have determined that, for many professions, the individuals best positioned to staff these boards are those that actively practice in the relevant field. These professionals' expertise and assistance has proven to be an invaluable tool for enforcing state law. If the Fourth Circuit's decision in *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, 717 F.3d 359 (4th Cir. 2013), is permitted to stand, however, federal antitrust law will be distorted to punish *Amici* States and the licensed professionals who serve on the States' boards, in violation of *Amici*'s sovereign authority to organize their own agencies as they see fit.

SUMMARY OF ARGUMENT

This case calls on the Court yet again to reaffirm that the federal antitrust laws were never intended, and should not be distorted, to interfere with the States' sovereign authority to regulate the industries within their borders. When Congress enacted the Sherman Antitrust Act in the late 19th century, it was understood that Congress lacked the

power to regulate purely intrastate activity and therefore never contemplated that the Act could reach the States' traditional sovereign function of regulating professions operating within their borders. In recognition of this original understanding, this Court adopted the state-action exemption following the expansion of the Commerce Clause jurisprudence in order to "preserv[e] to the States their freedom to administer state regulatory policies free of the inhibitions of the federal antitrust laws." *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 39 (1985). Under this Court's case law, when a State clearly articulates its policy and delegates enforcement of that policy to state actors of its choosing, courts may not—under the guise of enforcing federal antitrust law—overturn the State's sovereign decision. The identity of the personnel that comprise the board and the level of bureaucratic oversight over the actions of the board are of no concern to federal antitrust law.

In the decision below, the Court of Appeals for the Fourth Circuit departed from these well-established principles. It held that when States staff their regulatory agencies with active professionals in the relevant field, the States and the professionals are subject to a heightened risk of antitrust liability, including the specter of treble damages and criminal liability. That is not, and should not be, the law.

The Fourth Circuit's approach to the state-action exemption must be rejected because it conflicts with this Court's precedent and the history of the Sherman Act, and is an egregious

infringement on the States' self-governance in at least two respects:

First, the Fourth Circuit's rule punishes States for adopting the long-standing and ubiquitous practice of staffing regulatory boards with active professionals. The decision thus directly impinges upon the States' sovereign right to "prescribe the qualifications of their own officers." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (quotation marks omitted). The practical result of this assault on state sovereignty is to encourage States to abandon the use of regulatory boards staffed with active professionals, who are experienced and knowledgeable in the field, and replace those professionals with career bureaucrats who will often lack the same expertise.

Second, by subjecting professional-staffed regulatory boards to the "active supervision" test, the Fourth Circuit's rule undermines the States' sovereign right to determine which "agencies may be entrusted" with "exercising [which] of [their] governmental powers." *See City of Columbus v. Ours Garage & Wrecking Serv., Inc.*, 536 U.S. 424, 437 (2002) (quotation omitted). As part of determining how to subdivide their powers, States already have in place substantial supervisory and accountability regimes for their regulatory boards—from procedural protections to freedom of information requirements. But the Fourth Circuit would authorize federal courts to second-guess whether such oversight is sufficiently "active" in every case involving a regulatory board staffed by active professionals. What is more, this intrusive oversight would

incentivize States to adopt inefficient and duplicative bureaucratic structures, leading to significant negative consequences for the public.

ARGUMENT

I. THIS COURT ADOPTED THE STATE-ACTION ANTITRUST EXEMPTION BECAUSE THE FEDERAL ANTITRUST LAWS WERE NEVER INTENDED TO INTERFERE WITH STATES' ACTIONS AS SOVEREIGN REGULATORS.

As originally enacted, the Sherman Antitrust Act of 1890 did not even arguably implicate—let alone proscribe—the States' traditional sovereign function of regulating professions operating within their borders. By its terms, the Act outlaws private actions that "restrain" or "monopolize" "trade or commerce *among* the several States, or with foreign nations." 15 U.S.C. §§ 1, 2 (emphasis added). At the time Congress enacted the Act, the prevailing understanding was that Congress "lacked any power to regulate activity occurring completely within a state." Matthew L. Spitzer, *Antitrust Federalism and Rational Choice Political Economy: A Critique of Capture Theory*, 61 S. Cal. L. Rev. 1293, 1295 (1988). Under that view, "if the state regulation was constitutional, it was beyond the reach of Congressional power under the Sherman Act, and if the state regulation was within the reach of the Sherman Act, then it exceeded the state's legislative jurisdiction [pursuant to the Dormant Commerce Clause]." Herbert Hovenkamp & John A. MacKerron, *Municipal Regulation and Federal Antitrust Policy*, 32 UCLA L. Rev. 719, 725 (1985).

But the expansion of this Court's Commerce Clause jurisprudence roughly a half century later also led to an expanded interpretation of the Sherman Act and, with that, the possibility that the Act could reach state activity. During the 1930s, this Court enlarged what constituted "trade or commerce among the several States" under the Commerce Clause, and then transposed that enlarged understanding onto the Sherman Act as a matter of judicial construction. *See Hospital Bldg. Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 743 n.2 (1976) ("When Congress passed the Sherman Act in 1890, it took a very narrow view of its power under the Commerce Clause Subsequent decisions by this Court have permitted the reach of the Sherman Act to expand along with expanding notions of congressional power."). Under this approach, it became arguable that the meaning of "restraint" on "trade or commerce among the several States" in the Sherman Act prohibited broad swaths of traditional intrastate regulation, including those regulations that governed—and thus "restrain[ed]"—the manner in which certain professions could be practiced within a State's borders. *See* Richard Squire, *Antitrust And The Supremacy Clause*, 59 Stan. L. Rev. 77, 98 (2006). Even though the Sherman Act was not intended to trench upon the States' traditional authority as sovereign regulators, the broad words of the Act, as expanded by this Court's Commerce Clause jurisprudence, appeared to do just that.

This Court correctly put those arguments to rest in *Parker v. Brown*, 317 U.S. 341 (1943), adopting the state-action exemption in recognition of

the fact that the Sherman Act was never intended to impede States' traditional regulatory authority. The *Parker* Court explained that, even assuming that California's program of restricting competition among raisin growers would have violated the Sherman Act "if [the program] were organized and made effective solely by virtue of a contract, combination or conspiracy of private persons, individual or corporate," the program did not violate the Act because it was executed as state policy. *Id.* at 350-51. "[N]othing in the language of the Sherman Act or in its history," the Court reasoned, "suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." *Id.* Because States are a "sovereign" part of our Nation's "dual system of government," this Court declined to infer an "unexpressed purpose" to "nullify a state's control over its officers and agents" or hinder "the state in [its] execution of a governmental policy." *Id.* at 351-52.

Since *Parker*, this Court has repeatedly reaffirmed that proper understanding of the Act. When this Court returned to the scope of the state-action exemption from federal antitrust law in a series of cases almost fifty years after *Parker*, it reiterated the importance of affording due respect for federalism and state sovereignty. In *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), this Court based its analysis of the scope of the exemption on the understanding that "immunity for state regulatory programs is grounded in our federal structure." *Id.* at 103. In *Hallie v. City of Eau Claire*, 471 U.S. 34 (1985), this Court recognized that the exemption "preserv[ed] to

the States their freedom to administer state regulatory policies free of the inhibitions of the federal antitrust laws " *Id.* at 39. And in *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365 (1991), this Court touted "principles of federalism and state sovereignty," and then explained that "the general language of the Sherman Act should not be interpreted to prohibit anticompetitive actions by the States in their governmental capacities as sovereign regulators." *Id.* at 370, 374.

II. THE FOURTH CIRCUIT'S RULE WOULD SIGNIFICANTLY INTERFERE WITH, AND HAVE NEGATIVE CONSEQUENCES FOR, THE STATES' SELF-GOVERNANCE.

The Fourth Circuit's parsimonious approach to the state-action exemption must be rejected because it conflicts with this Court's precedent and the history of the Sherman Act, and egregiously infringes state sovereignty. Above all, it is "through the structure of its government, and the character of those who exercise government authority, [that] a State defines itself as a sovereign." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991); *accord Sailors v. Bd. of Ed. Of Kent Cnty.*, 387 U.S. 105, 109 (1967) (each State, as a sovereign entity, maintains "vast leeway in the management of its internal affairs"). Yet, the Fourth Circuit held that when a State staffs a regulatory board with active professionals, that board must be "actively supervised" by full-time state employees or be subject to federal antitrust law. This direct attack on the States' ability to use a method of governance that they have found desirable and beneficial must be rejected.

A. The Fourth Circuit's Threat Of Antitrust Liability On Professional-Staffed State Agencies Would Undermine The States' Sovereign Authority To Staff Their Own Agencies In The Manner They Have Deemed Most Desirable.

A State's choices about the individuals who serve in its government are decisions "of the most fundamental sort for a sovereign entity." *Gregory*, 501 U.S. at 460. As this Court has explained, those are questions that are within "an area traditionally regulated by the States." *Id.* It is "essential to the independence of the States, and to their peace and tranquility," that they retain "their power to prescribe the qualifications of their own officers," *id.*, and "the manner in which [their officials] shall be chosen," *id.* (quotation omitted).

In exercising that power, the States have chosen to staff "[t]he majority of licensing boards [with] active members of the profession being licensed." J.F Barron, *Business and Professional Licensing – California, a Representative Example*, 18 Stan. L. Rev. 640, 649 (1966). *Amici* States alone use active professionals to oversee, among many others: doctors,[1] dentists,[2] chiropractors,[3] nurses,[4]

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[1] *See, e.g.*, Ind. Code § 25-22.5-2-1; Mich. Comp. Laws § 333.17021; N.C. Gen. Stat. § 90-2 *et seq.*; Tenn. Code Ann. § 63-6-101; Va. Code Ann. § 54.1-2911; W. Va. Code § 30-3-5.

[2] *See, e.g.*, Ark. Code Ann. § 17-82-201 *et seq.*; Ind. Code § 25-14-1-2(a); Ohio Rev. Code § 4715.02; N.C. Gen. Stat. § 90-22 *et seq.*; Tenn. Code Ann. § 63-5-102; Va. Code Ann. § 54.1-2702; (2013); W. Va. Code § 30-4-4.

pharmacists,[5] auctioneers,[6] optometrists,[7] veterinarians,[8] lawyers,[9] architects,[10] funeral directors,[11] accountants,[12] plumbers,[13] general engineers,[14] technical professionals,[15] real estate brokers,[16] social workers,[17] veterinarians,[18] and appraisers.[19]

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[3] *See, e.g.*, Ind. Code § 25-10-1-1.5(a); Tenn. Code Ann. § 63-4-102; W. Va. Code § 30-16-1 *et seq.*

[4] *See, e.g.*, Mich. Comp. Laws § 333.17221.

[5] *See, e.g.*, Ind. Code § 25-4-1-2; N.C. Gen. Stat. § 90-85.6, 85-7; Tenn. Code Ann. §§ 63-10-301, 63-10-301-302; Va. Code Ann. § 54.1-3305 (2013); W. Va. Code § 30-5-1 *et seq.*

[6] *See, e.g.*, Ind. Code § 25-6.1-2-1(c); Tenn. Code Ann. § 62-19-104; Va. Code Ann. § 54.1-602.

[7] *See, e.g.*, N.C. Gen. Stat. § 90-116 *et seq.*; Tenn. Code Ann. § 63-8-103; Va. Code Ann. § 54.1-3207; W. Va. Code § 30-8-1 *et seq.*.

[8] *See, e.g.*, N.C. Gen. Stat. § 90-182; Tenn. Code Ann. § 63-12-104; Va. Code Ann. § 54.1-3802; W. Va. Code § 30-10-4.

[9] *See, e.g.*, N.C. Gen. Stat. § 84-15 *et seq.*; Tenn. Sup. Ct. R. 9.

[10] *See, e.g.*, Ind. Code § 25-4-1-2(b); N.C. Gen. Stat. § 83A-2; Tenn. Code Ann. § 62-2-201; Va. Code Ann. § 54.1-403; W. Va. Code § 30-12-1 *et seq.*

[11] *See, e.g.*, N.C. Gen. Stat. § 90-210.18A; Tenn. Code Ann. § 62-5-201; Va. Code Ann. § 54.1-2802; W. Va. Code § 30-6-1 *et seq.*

[12] *See, e.g.*, Ind. Code § 25-2.1-2-3(b); Mich. Comp. Laws § 339.721; Va. Code Ann. § 54.1-4402; W. Va. Code § 30-9-3.

[13] *See, e.g.*, Ind. Code § 25-28.5-1-4(a).

[14] *See, e.g.*, Ark. Code Ann. § 17-30-201 *et seq.*; Ind. Code § 25-31-1-3(b); N.C. Gen. Stat. § 89C-4; Tenn. Code Ann. § 62-2-201; Va. Code Ann. § 54.1-403; W. Va. Code § 30-13-1 *et seq.*

[15] *See, e.g.*, Kan. Stat. Ann. § 74-7004.

[16] *See, e.g.*, Mich. Comp. Laws § 339.2502.

Amici States have chosen to staff many of their regulatory boards with active professionals because such professionals ordinarily have "specialized knowledge" that the "lay public," career bureaucrats, and state legislators lack. *California Dental Ass'n v. FTC*, 526 U.S. 756, 772 (1999). Doctors, nurses, architects, attorneys, accountants, and numerous other regulated professions undergo years of advanced study, professional certification, and continuing education. "It is logical to assume that only those already qualified in [such] profession[s] can judge the competence of others to practice the profession." Barron, *Business and Professional Licensing*, *supra*, at 649. And it is not often that persons with such hard-won—and often expensive—knowledge and expertise will be willing to give up their active trades in order to serve as full-time government regulators.

Moreover, active professionals maintain a current knowledge base that inactive individuals with similar training will not have. Thus, even if sufficiently qualified professionals could be convinced to join full-time government employment in some fields, that would not necessarily be desirable. Highly-specialized fields such as medicine and dentistry change quickly. It is often individuals who practice in those fields day in and day out who are

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[17] *See, e.g.*, Tenn. Code Ann. § 63-23-101; Va. Code Ann. § 54.1-3703; W. Va. Code § 30-30-1 *et seq.*

[18] *See, e.g.*, Kan. Stat. Ann. § 47-818; Ind. Code § 25-38.1-2-4(a).

[19] *See, e.g.*, Ark. Code Ann § 17-14-201 *et seq.*; N.C. Gen. Stat. § 93E-1-4; Tenn. Code Ann. § 62-39-201; Va. Code Ann. § 54.1-2012; W. Va. Code § 30-38-1 *et seq.*

best situated "to spot emerging threats to public welfare in their respective fields," and to do so "faster than state legislators or bureaucrats." Ingram Weber, *The Antitrust State Action Doctrine and State Licensing Boards*, 79 U. Chi. L. Rev. 737, 755 (2012).

The Fourth Circuit's approach violates state sovereignty because it undermines the States' right to staff their agencies in the manner they have deemed most desirable. The Fourth Circuit would punish the decision to use active professionals on regulatory boards with an increased risk of federal antitrust liability. In turn, States may feel compelled to use full-time government employees for the enforcement of their regulatory regimes and to give up the substantial benefits that active professionals bring to the administration of state law. And even if States wish to risk antitrust liability and to retain active professional boards, qualified professionals may simply refuse to serve. After all, "[t]here can be no question that the threat of being sued for damages [under the Sherman Act]—particularly where the issue turns on subjective intent or motive—will deter able citizens from performing this essential public service." *Hoover v. Ronwin*, 466 U.S. 558, 580 n.34 (1984). This is especially true because the prospect of being sued under the Sherman Act carries with it the threat of personal liability of treble damages and attorneys' fees (15 U.S.C. § 15), as well as "criminal liability" (*Omni*, 499 U.S. at 373 n.4).[20]

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[20] The fact that the active professionals that staffed the regulatory board at issue here were selected by their peers was

That cannot be squared with the history and principles underlying the state-action exemption. This Court recognized that exemption precisely so that the Sherman Act would not be misapplied to undermine sovereign prerogatives. For this reason alone, the Fourth Circuit's approach must be rejected.

B. The Fourth Circuit's Imposition Of The "Active Supervision" Requirement On Professional-Staffed State Agencies Would Substantially Intrude On The States' Supervision Of Those Agencies.

Also "central to state self-government" is a State's discretion to subdivide its powers among agencies. *City of Columbus v. Ours Garage & Wrecking Serv., Inc.*, 536 U.S. 424, 437 (2002). As this Court has explained, States have the sovereign authority to determine which of their "agencies may be entrusted" with "exercising [which] of [its] governmental powers." *Id.* (quotation omitted); *accord Omni*, 499 U.S. at 372 ("[S]tate administrative review" is not "a federal antitrust job"). Indeed, this Court has instructed that federal legislation "threatening to trench on the States' arrangements for conducting their own governments should be treated with great skepticism, and read in

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highlighted by the Fourth Circuit, but this was not critical to the court's reasoning. Nor does it, in any event, lessen the intrusion on the States' sovereign authority over their officials. States have no less a sovereign right to determine "the manner in which [their officials] shall be chosen" *Gregory*, 501 U.S. at 460 (quotations omitted), as they do to "prescribe the qualifications of th[ose] officers," *id.*

a way that preserves a State's chosen disposition of its own power." *Nixon v. Missouri Mun. League*, 541 U.S. 125, 140 (2004).

In exercising that sovereign authority, the States have carefully crafted mechanisms to ensure that all state governmental bodies—including regulatory boards staffed with active professionals—are properly exercising their delegated powers. In West Virginia, for example, the members of regulatory boards must comply with ethical rules applicable to all state governmental officials,[21] must open their meetings to the public,[22] must follow state freedom of information rules,[23] must issue annual reports as to the boards' activities,[24] must subject themselves to audits conducted by legislative committees,[25] and must submit their administrative rules for approval by the legislature.[26] Consistent with each State's sovereign authority to structure its government as it sees fit, the particular oversight mechanisms vary from State to State.[27]

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[21] W. Va. Code § 6B-2-1 *et seq.*

[22] W. Va. Code § 6-9A-3.

[23] W. Va. Code § 29B-1-1 *et seq.*

[24] W. Va. Code § 30-1-17.

[25] W. Va. Code § 4-2-1 *et seq.*

[26] W. Va. Code § 29A-3-9, *et seq.*

[27] *See, e.g.*, Ariz. Rev. Stat. Ann. § 41-1279.04 (state board records subject to inspect by Auditor General); 29 Del. Code § 10142 (state board decisions subject to state administrative procedure act); Kan. Stat. Ann. § 77-501 *et seq.* (same); Neb. Rev. Stat. § 84-901 *et seq.* (same); Kan. Stat. Ann. § 75-4317 *et seq.* (state board meetings subject to state open meeting's law);

The Fourth Circuit's approach violates state sovereignty because it would subject these state-designed regimes to intrusive federal court review in every antitrust action brought against a regulatory board staffed with active professionals. In each case, the court would be obligated to determine whether the methods described above were sufficiently "active." According to the Fourth Circuit, "[t]he mere presence of some state involvement or monitoring" or "generic oversight" is insufficient to satisfy the "active supervision" requirement. Pet. App. 17a-18a (quotation omitted). Whether the various supervisory and accountability provisions outlined above would be deemed by a federal court sufficiently "active"—or insufficiently "generic"—therefore would involve an unpredictable, case-by-case inquiry, where different federal judges may come to different conclusions. *See generally* William J. Martin, *State Action Antitrust Immunity for Municipally Supervised Parties*, 72 U. Chi. L. Rev. 1079, 1087-88 (2005) (describing uncertainty in the lower courts regarding application of the "active supervision" test). Subjecting the States' supervisory choices to such invasive federal oversight plainly trenches upon the States' authority to determine which of their agencies "exercise[e] [which] of [their] governmental powers." *City of Columbus*, 536 U.S. at 437.

Va. Code Ann. § 2.2-3707 (same); Neb. Rev. Stat. § 84-1407 *et seq.* (same); Neb. Rev. Stat. § 84-922 *et seq.* (state board subject to additional rulemaking requirements); N.C. Gen. Stat. § 93B-2(a) (state boards must issue annual reports); Va. Code Ann. §§ 2.2-108(B), 54.1-107 (state board members subject to appointment and for-cause removal by Governor).

What is more, the Fourth Circuit's approach would incentivize States to adopt inefficient and duplicative methods of governance. In order to avoid federal court oversight, States may simply opt for cumbersome bureaucratic structures that would undeniably satisfy the "active supervision" requirement. Specifically, States may subject *every* decision made by regulatory boards staffed by active professionals—including routine licensing decisions—to direct oversight and approval by full-time state employees. But this outcome would have numerous negative public policy consequences:

First, a requirement that full-time state employees must approve every decision made by regulatory boards staffed by active professionals would add significant expense in terms of paying for state employee time, at a time when many States' budgets are already overburdened. *See* Weber, *The Antitrust State Action Doctrine*, *supra* at 773 ("States choose to delegate power to privately composed boards in part because they are cheaper than bureaucratic agencies and reduce the attention legislatures must give to creating regulations themselves.").

Second, the additional layer of bureaucracy would necessarily slow decision making, as every decision by the regulatory board would need to be approved (or disapproved) by the additional layer of state employees. This would extend the wait time of those seeking to obtain professional licenses or to vindicate their name against complaints, thus putting jobs, livelihoods and reputations at stake.

Third, this cumbersome bureaucracy would not produce better decisions. As explained above, States have found that active professionals are valuable members of regulatory boards because those professionals have "the specialized knowledge" that the "lay public," career government officials, and state legislators lack. *Cal. Dental Ass'n*, 526 U.S. at 772. Yet, if those experts' decisions are merely contingent, always subject to revision and oversight by full-time government employees lacking the active professionals' expertise, the benefit of that specialized knowledge will be diluted. Indeed, the frustration of coping with this constant oversight would likely diminish the quality of the professionals willing to devote time away from their active practices to serve on regulatory boards.

Fourth, adding a layer of bureaucracy into licensing and other regulatory decisions will actually have the reverse of its intended effect: rather than decrease anti-competitive behavior, it will *increase* opportunities for rent-seeking and regulatory capture. As Judge Easterbrook has explained, the "active supervision" requirement forces States to adopt duplicative regulatory structures, which are particularly "conducive to competition among cartelists for rents." Frank H. Easterbrook, *Antitrust and the Economics of Federalism*, 26 J.L. & Econ. 23, 30 (1983). In the context of regulatory agencies, an additional layer of supervision over those agencies simply gives private actors seeking to use the state regulatory apparatus for their anti-competitive ends two access points for their influence: either the regulatory board itself, or the career bureaucracy overseeing that board. While the Fourth Circuit

believed that its rule would forward the procompetitive goals of antitrust law, there is every reason to believe that the practical result would be just the opposite.

Finally, all of these costs would come with little benefit. The active supervision requirement is designed only to ensure that a State is not "casting a gauzy cloak of state involvement over what is essentially a private arrangement." *Hallie*, 471 U.S. at 146-47. Where a State has created a board to regulate professionals operating within its borders, clearly articulated the laws the board is to enforce, and then staffed that board with experts of the State's choice, the arrangement is entirely of the State's making. In that circumstance, the active supervision inquiry plays no useful role.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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